TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~113~~. 819 ~~437~~ 1149

ANDREW WESLEY KENT, EXECUTOR AND TRUSTEE OF JONATHAN TREMAINE WELLS, DECEASED, APPELLANT,

vs.

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY; THEODORE M. DAVIS, AND THEODORE M. DAVIS AS RECEIVER OF THE OCEAN NATIONAL BANK OF NEW YORK; J. BOORMAN JOHNSTON, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED OCTOBER 4, 1888.

SUPREME COURT OF THE UNITED STATES.

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No. 1193.

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1 *Summons.*

N. Y. Supreme Court.

Trial to be had in the County of Kings.

ANDREW W. KENT, as Executor and Trustee under the Last Will and Testament of Jonathan Tremaine Wells, Deceased, Plaintiff,

against

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY, Theodore M. Davis, and Theodore M. Davis as Receiver of the Ocean National Bank of New York; J. Boorman Johnston, Isaac H. Knox, and Gordon Norrie, Being the Surviving Partners of the Firm of J. Boorman Johnston and Company; Frederick Ayer, Sole Surviving Partner of the Firm of J. C. Ayer and Company; Frederick F. Ayer, Josephine Ayer, and Benjamin Dean, Administrators, with Will Annexed, of the Estate of James C. Ayer, Deceased, and Thomas N. McCarter, Defendants.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated February 7, 1884.

TUDOR S. JENKS,
Plaintiff's Attorney.

Office and post-office address, No. 10 Pine street, New York city, N. Y.

2 Supreme Court.

Trial to be had in the County of Kings.

ANDREW W. KENT, as Executor and Trustee under the Last Will and Testament of Jonathan Tremaine Wells, Deceased, Plaintiff,

against

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY, Theodore M. Davis, and Theodore M. Davis as Receiver of the Ocean National Bank of New York; J. Boorman Johnston, Isaac H. Knox, and Gordon Norrie, Being the Surviving Partners of the Firm of J. Boorman Johnston and Company; Frederick Ayer, Sole Surviving Partner of the Firm of J. C. Ayer and Company; Frederick F. Ayer, Josephine Ayer, and Benjamin Dean, Administrators, with Will Annexed, of the Estate of James C. Ayer, Deceased, and Thomas N. McCarter, Defendants.

Andrew W. Kent, the plaintiff above named, respectfully shows to this court, upon his information and belief, as follows:

First. On or about the 14th day of May, 1883, letters testamentary

upon the estate of Jonathan Tremaine Wells, deceased, were granted by the surrogate of the county of Kings, State of New York, unto this plaintiff, under the last will and testament of said Wells, which will was duly admitted to probate by said surrogate May 14, 1883. Under and by virtue of said will and letters testamentary this plaintiff entered into possession of all the real and personal property and choses in action of said Jonathan Tremaine Wells, deceased.

Second. On or about the sixth day of July, 1864, the Portage Lake and Lake Superior Ship Canal Company was organized as a corporation under the laws of the State of Michigan for the purpose
3 of constructing a ship canal to connect the waters of Portage Lake and Lake Superior.

Third. By an act of the Congress of the United States, entitled "An act granting land to the State of Michigan to aid in building a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior," passed and approved March 3, 1865, two hundred thousand acres of public lands were granted to the State of Michigan for the purpose above described, to be selected from lands in the upper peninsula of the State of Michigan, which grant was subject to conditions and restrictions, among which was the condition that the lands should revert to the United States in case the said canal and harbor should not be completed in two years from the passage of the act.

By an act entitled "A bill to accept a grant of land by act of Congress to aid in the construction of the ship canal at the head of Portage Lake with Lake Superior, and to provide for the construction of the same," passed March 16, 1865, by the Legislature of the State of Michigan, the said grant was accepted by the State of Michigan, and by it conferred upon the said Portage Lake and Lake Superior Ship Canal Company, subject to the conditions and obligations therein mentioned, among which was the following, to wit: "That none of said lands shall be sold or otherwise disposed of, except for the purposes of hypothecation, until said canal shall be completed as therein provided." By said act the said company was duly authorized to hypothecate or mortgage the lands thereby conferred upon said company, without reference to completion of said harbor and canal.

On or about the 1st day of July, 1865, the said company made, executed, and delivered one thousand certain bonds of the par value of five hundred dollars each, conditioned to pay the principal of said bonds on the first day of July, 1875, and interest at ten per cent. per annum, payable semi-annually. To secure the payment of the said bonds according to their terms the said company, on or about the first day of July, 1865, executed a deed of trust, wherein and whereby it conveyed to Columbus C. Douglas and his successors the said canal and franchises and the said two hundred
4 thousand acres of land granted as aforesaid to the State of Michigan and said company, together with other property and rights, in trust for the benefit of those who might become holders of said bonds. A copy of said deed of trust is hereto annexed and marked "Exhibit A."

Fourth. By an act of the Congress of the United States, entitled

"An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, in said State," passed and approved July 3, 1866, there was granted to the State of Michigan for the purpose aforesaid, in addition to the above-described grant, two hundred thousand acres of land, subject to certain restrictions and conditions in said act contained; and it was in and by said act expressly provided that said grant of lands should inure to the use and benefit of the said Portage Lake and Lake Superior Ship Canal Company, in accordance with the act of the Legislature of the State of Michigan hereinbefore referred to, thereby conferring upon said company the right to hypothecate or mortgage said second grant of land without reference to the completion of said harbor and canal.

Fifth. On or about the 1st day of July, 1868, the said company made, executed, and delivered one thousand certain other bonds of the par value of five hundred dollars each, and numbered 1 to 1000 consecutively, conditioned to pay the principal of said bonds on the first day of July, 1878, and interest at ten per cent. per annum, payable semi-annually on the first days of January and July in each year; and, to secure the payment of the money to become due upon said bonds according to their terms, the said company, on or about the 1st day of July, 1868, executed a deed of trust, wherein and whereby it conveyed to D. Randolph Martin and Thomas T. Davis and their successors or successor the said two hundred thousand acres of land as aforesaid granted to said State and said company by the said act of Congress of July 3, 1866, together with the equity of redemption in and to said ship canal and other property so as aforesaid conveyed to Columbus C. Douglas in and by the above-recited deed of trust, in trust for the holders or owners of the last-described bonds, and with the powers, duties, and privileges in said deed of trust expressed. A copy of said deed of trust is hereto annexed and marked "Exhibit B."

Sixth. Shortly after said last-mentioned bonds had been made said Jonathan Tremaine Wells became the purchaser of eighty of said bonds from the said company, and paid cash therefor, which money was applied by said company in the construction of said harbor and canal. Said bonds in the hands of said Jonathan Tremaine Wells were secured by said last-mentioned deed of trust; and plaintiff charges that the trustees therein mentioned and their successors, by virtue of such deed of trust, held and owned a valid and subsisting lien upon the lands embraced in said second grant of Congress, in trust for said Jonathan T. Wells and all other persons who should become lawfully and for value the owners of any of said second series of bonds, irrespective of the completion of said harbor and canal.

Seventh. On or about the first day of July, 1870, the said company made, executed, and issued one thousand two hundred and fifty certain other bonds of the par value of one thousand dollars each, and numbered from 1 to 1,250 consecutively. Afterwards two hundred and fifty of said bonds were paid, redeemed, and cancelled by said company by bonds of a subsequent issue, known as the Union trust

bonds, and hereinafter referred to. To secure the payment of the money due upon said bonds according to their terms said company executed a third deed of trust, conveying its equity of redemption in all the property covered by the two preceding deeds of trust or mortgages to Charles L. Frost and his successors, in trust for the holders or owners of the bonds issued by virtue thereof, with the powers, duties, and privileges in said deed of trust expressed; a copy of which said deed of trust is hereto annexed and marked "Exhibit C."

Eighth. After said last-mentioned bonds had been made, and after the said two hundred and fifty bonds of that issue had been paid and cancelled as aforesaid, said Jonathan Tremaine Wells became the holder and owner of forty of the said bonds so secured by
6 the trust deed to Charles L. Frost, trustee aforesaid. Plaintiff charges that the holding and ownership of said forty bonds as aforesaid conferred upon said Jonathan Tremaine Wells, by virtue of certain clauses in said deeds of trust relating to such redemption, the right to redeem from the operation of the said Martin and Davis mortgage eight thousand acres of land, parcel of the lands covered by these mortgages, in the manner hereinafter set forth.

Ninth. On or about the 29th day of April, 1871, the said company duly made and adopted amended articles of incorporation, whereby the name of the said corporation was changed to the Lake Superior Ship Canal, Railroad and Iron Company.

Tenth. Thereafter and prior to the 1st day of May, 1874, the Lake Superior Ship Canal, Railroad and Iron Company became seized and possessed by purchase of the entrance canal by way of Portage river into Portage Lake, with the franchises appertaining thereto, and also acquired title to or the right to mortgage for the benefit of said company two hundred thousand acres of land, or thereabouts, situated in the State of Michigan and known as the "wagon-road lands."

Eleventh. On or about the 1st day of May, 1871, the said company executed a deed of trust to the Union Trust Company of New York, as trustee, wherein and whereby they conveyed to the said trust company all and singular the canal constructed through from Keweenaw Bay through Portage river and lake and through the neck of land called the Portage to Lake Superior, with all rights and franchises appertaining to said canal; and also six hundred thousand acres of pine and mineral lands, situate, lying, and being in the State of Michigan, and described as follows: Two hundred thousand acres, granted by act of Congress approved March 3, 1865, as hereinbefore recited and referred to; two hundred thousand acres, granted by act of Congress approved July 3, 1866, also hereinbefore recited and referred to; and also the said two hundred thousand acres of land in the State of Michigan known as the "wagon-road lands," to secure the payment of bonds which said company
7 proposed to issue, to the number of thirty-five hundred bonds, of the par value of one thousand dollars each; but said deed of trust was subject in all respects to the provisions of the deeds of trust hereinbefore referred to.

Of the said last-mentioned bonds the defendants claim that there were afterwards actually issued and negotiated thirteen hundred, of the par value of one thousand dollars each, and no more.

Twelfth. Under the deed of trust first above referred to and bearing date July 1, 1865, such proceedings were afterwards duly had pursuant to the provisions thereof that on the 13th day of April, 1872, John L. Sutherland succeeded to the trust originally held thereunder by Columbus C. Douglas, and said deed of trust will hereinafter be designated as the Sutherland trust deed. Under the deed of trust secondly above referred to and bearing date July 1, 1868, such proceedings were afterwards duly had pursuant to the provisions thereof that on the 30th day of December, 1870, Lucien Birdseye succeeded to the trust originally held thereunder by D. Randolph Martin and Thomas T. Davis, which deed of trust will hereinafter be called the Birdseye trust deed. Under the deed of trust thirdly above referred to, and bearing date July 1, 1870, such proceedings were had that on the 1st day of July, 1872, Thomas N. McCarter succeeded to the trust originally held thereunder by Charles L. Frost, which deed will be hereinafter called the McCarter trust deed.

Thirteenth. At divers times between the years 1865 and 1872 and after the dates of their issue, as hereinbefore set forth, the said company hypothecated certain of the bonds issued under the first three deeds of trust herein described, and at divers times during the years 1871 and 1872 hypothecated certain of the bonds issued under the fourth deed of trust herein described, but only a small proportion of each issue of said bonds were ever sold outright by said company.

Fourteenth. In the months of November, 1871, and January 1872, said canal company defaulted in the payment of the interest then due upon its several issues of bonds. At the time of the said defaults very large amounts of the bonds issued as aforesaid by said canal company were held by the following parties, to wit: The Ocean National Bank of the city of New York, the firm of J. Boorman Johnston & Co., composed of J. Boorman Johnston, Isaac H. Knox, Gordon Norrie, and Adam Norrie, and the firm of J. C. Ayer & Co., of the city of Lowell, in the State of Massachusetts, then composed of James C. Ayer and Frederick Ayer, as collateral to certain loans, which plaintiff charges were of doubtful legality, made by said parties to the said canal company at divers times before said default; and it was claimed by said company that the bonds pledged as security for said loans were issued unlawfully and in violation of the law of Michigan.

Fifteenth. In December, 1871, the said Ocean National Bank failed, and one Theodore M. Davis, of the city of New York, was appointed its receiver by the Comptroller of the Currency. Among the assests of the said bank were bonds under all the aforesaid deeds of trust or mortgages, but the most of said bonds were under the McCarter and union trust mortgages. Some of the bonds in the possession of the bank were owned by it, but by far the larger part

were held as collateral to loans of the character charged in the preceding article.

Sixteenth. Prior to the said defaults the said company had selected with care and at much expense the lands it became entitled to select under and by virtue of the aforesaid acts of Congress and of the Legislature of the State of Michigan in the upper peninsula of said State, and the lands so selected were regarded as of great prospective value on account of the rich timber growth and the mineral wealth of that region, and the lands selected under the act of Congress of July 3, 1866, covered by the Birdseye trust deed, were especially valuable because they were known to contain a large amount of pine lands and rich iron mines.

Seventeenth. Early in 1872 the said Theodore M. Davis, receiver; J. Boorman Johnston & Co., and J. C. Ayer & Co. retained
9 Alfred Russell, of Detroit, Michigan, as their agent, attorney, solicitor, and counsel to protect and further their respective interests as creditors and bondholders of said company, and in the prospective legal proceedings in the United States courts held in and for the eastern district of the State of Michigan, for the foreclosure of said deeds of trust or mortgages, and to act for and represent them therein. Said Russell was afterwards retained and employed by the said trustees, John L. Sutherland, Lucien Birdseye, Thomas N. McCarter, and the Union Trust Company of New York, as their solicitor to foreclose the several mortgages which they severally represented as trustees; that this employment was by the procurement of the said Theodore M. Davis, receiver, J. Boorman Johnston & Co., and J. C. Ayer & Co., and upon their retainer and in their interest without reference to the interests of the other bondholders under said mortgages, and it was agreed between them and the said trustees that said foreclosure suits were to be prosecuted under their directions and for their special benefit, and to this end they indemnified the said trustees, John L. Sutherland, Lucien Birdseye, and Thomas N. McCarter, against all loss and damage which might arise to them by reason of any matter or thing which the said Theodore M. Davis, receiver, J. Boorman Johnston & Co., and J. C. Ayer & Co. might do or cause to be done in or about the prosecution of such suits and the sale of the property described in said deeds of trust.

Eighteenth. On or about the 25th day of May, 1872, a bill was filed in the circuit court of the United States for the eastern district of Michigan in the name of John L. Sutherland, trustee, by Alfred Russell, his solicitor, to foreclose the said mortgage made by the Portage Lake and Lake Superior Ship Canal Company to said Columbus C. Douglas, dated July 1, 1865; and the Lake Superior Ship Canal, Railroad and Iron Company, Lucien Birdseye, trustee; Charles L. Frost, trustee, and The Union Trust Company, trustee, were made parties defendant. Said Lucien Birdseye, trustee, was made a party defendant thereto simply as the trustee of a junior incum-
10 brance, to wit, said mortgage or deed of trust of date July 1, 1868. He was at the filing of said bill and has been ever since a citizen of the State of New York. To give said court an apparent jurisdiction over the controversy between said Sutherland,

trustee, and Birdseye, trustee, it was alleged in said bill that said Sutherland was a citizen of the State of New Jersey, although in fact said Sutherland was, at the time of the filing of said bill and for many years prior thereto, a citizen and resident of the State of New York. Such proceedings were had in said suit that on or about the 13th day of June, 1872, upon the petition of the complainant, an order was made and entered therein appointing Isaac H. Knox, of New York, receiver of the ship canal and franchise of said defendant company and of all the lands covered by or embraced in the mortgage held by the complainant in the bill in said cause and belonging to said corporation. Upon the motion for such receiver it was admitted by stipulation of the solicitors of said Lucien Birdseye, trustee, that said Sutherland, trustee, was a citizen and resident of the State of New Jersey, as alleged in said bill. Plaintiff charges that said stipulation, if of any effect, extended only to the said order appointing said receiver, and said circuit court was afterwards, by the pleadings and proofs filed in said suit, shown to have no jurisdiction therein, and it had in fact no jurisdiction therein, and all the proceedings apparently had in said suit were and are null and void, so far as the said Birdseye and the lands described in the fourth article of this complaint are concerned.

Nineteenth. On the 17th day of June, 1872, an order was made in said suit authorizing said receiver to execute an instrument to Frederick D. Tappan, as trustee, to secure certificates of indebtedness authorized to be issued by said receiver for the purpose of completing the construction of said canal. The said order declared "that the indebtedness created by said receiver's certificates shall constitute a first and paramount lien over all other liens and incumbrances upon the ship canal, real and personal property, and franchises of said defendant corporation and on all the future
11 earnings and income thereof, and shall be entitled to priority and payment over all other claims out of said real and personal property, earnings, and income, except such expenses as may be necessary to maintain and operate said canal after completion, until the same shall have been fully paid and discharged, whether said receiver shall continue in the exercise of his office or shall have been suspended or discharged; and in case said canal, real and personal estate, and franchises or any part thereof shall be sold under and in pursuance of any judicial decree said certificates of indebtedness remaining unpaid shall first be paid out of the proceeds of said sale; and said order further authorizes said receiver to sell said certificates at a discount not exceeding twenty-five per cent. of their par value or to pledge the same for loans incurred by him for the purposes aforesaid.

Twentieth. Said Isaac H. Knox, claiming to act as receiver, under and by virtue of said order issued certificates to the amount of about six hundred and forty thousand dollars, which were purchased by said J. Boorman Johnston & Co. and J. C. Ayer & Co. Five hundred thousand dollars of said issue were sold at the rate of seventy-five cents on the dollar and the remainder at the rate of sixty cents on the dollar. The said certificates of indebtedness were issued

as aforesaid by the procurement and in the interest of said Theodore M. Davis, receiver of the Ocean National Bank; J. Boorman Johnston & Co., and J. C. Ayer & Co., and were all purchased and acquired in their interest for the purposes hereinafter set forth.

Twenty-first. On or about the 27th of August, 1872, the said The Lake Superior Ship Canal, Railroad and Iron Company was adjudicated a bankrupt by the district court of the United States for the eastern district of Michigan, and on the 3d day of December, 1872, George Jerome, of Detroit, and Fernando C. Beaman, of Adrian, Michigan, were duly appointed by said court assignees in bankruptcy of said company.

Twenty-second. On or about the 3d day of January, 1873, a supplementary bill was filed in the said Sutherland suit making
12 the said assignees in bankruptcy and Thomas N. McCarter, trustee, parties defendant. On or about the 3d day of July, 1872, a bill was filed in said circuit court in the name of said Thomas N. McCarter, trustee, by said Alfred Russell, his solicitor, to foreclose the said mortgage made and executed by said canal company to Charles L. Frost, dated July 1, 1870, and the said canal company and The Union Trust Company of New York were made parties defendant. On or about the 13th day of January, 1873, a supplementary bill was filed in said McCarter suit making the said assignees in bankruptcy parties thereto.

Twenty-third. On or about the fifth day of July, 1872, a bill was filed in said circuit court in the name of Lucien Birdseye, trustee, by said Alfred Russell, his solicitor, to foreclose the said mortgage made and executed by the said company to said D. Randolph Martin and Thomas T. Davis, dated July 1, 1868, and the said canal company, Thomas N. McCarter, trustee, and The Union Trust Company of New York, trustee, were made parties defendant. Said bill alleges the appointment of said Knox as receiver in the Sutherland suit, and that as such receiver he had taken possession of the ship canal and mortgaged property; the issuance by him, as receiver in said suit, of certificates of indebtedness to the amount of five hundred thousand dollars, and that said certificates, by order of said circuit court in said suit, were made a paramount lien upon the ship canal and all the real and personal property of the canal company, and said bill prays that such certificates may be first paid ratably from the proceeds of the sales of the lands covered by the Sutherland and Birdseye deeds of trust; and plaintiff charges that the recognition of said certificates as a paramount lien in said last-mentioned bill of foreclosure was entirely unauthorized by any of the bondholders under said Birdseye trust deed sought to be foreclosed, and was never ratified by the said Jonathan Tremaine Wells or by any other of the said bondholders except said J. Boorman Johnston & Co., J. C. Ayer & Co., and Theodore M. Davis, receiver, and was the trick or device of the agent or counsel of said parties to obtain title to and pos-
13 session of the entire property of the said canal company and to obtain the payment of all their bonds in fraud of the said Jonathan Tremaine Wells and other holders of bonds under

the Birdseye trust deed; and plaintiff alleges that neither said Birdseye nor said Russell for him claimed or had any right, power, or authority under said deed of trust to deprive the bondholders of any rights of prior payment originally vested in the bondholders under the said deed of trust; that the said receiver never derived nor professed to derive any power or authority from the jurisdiction of the court in said Birdseye suit, and plaintiff charges that all questions as to said receiver's power and authority and as to his administration of his trust were only cognizable in the Sutherland suit, and that all the allegations in said bill filed in the name of said Birdseye in reference to said receivership, if they can be regarded as of any effect in the premises, were not allegations of facts intended for issue, but of themselves raised a question of law for the court to decide when it should pass upon the obligations of the trustee in reference to the disposition of the fund in hand, which said question of law the court never did in fact decide or pass upon.

Twenty-fourth. On or about the 5th day of August, 1872, said Birdseye, trustee, filed an answer in the Sutherland suit, in which, among denials of the allegations of the bill therein filed, he set up as a defense to the suit a want of jurisdiction in the court, in that the said Sutherland, trustee, was not at the time of the filing of said bill of complaint or since a citizen of the State of New Jersey, but was at all such times a citizen and resident of the State of New York, and that the defendants, Charles L. Frost, Lucien Birdseye, and The Union Trust Company, were during all the times aforesaid citizens and residents of the State of New York. Afterwards, in 1874, the testimony of said Sutherland, taken on commission, was filed in said suit, in which he admitted that he had voted and paid personal taxes as a citizen of New York for eighteen years then last past, and that his claim, if any there was, to a citizenship in New Jersey was founded solely on the fact that he spent about a month in the summer of 1872 as a boarder in Orange, in the State of New Jersey.

14 Twenty-fifth. Plaintiff charges that said circuit court did not obtain jurisdiction or power over the lands described in the act of Congress passed July 3, 1866, and conveyed by the Birdseye trust deed or over the bondholders secured thereby, either by the representation of their trustee or otherwise, so as to enable said court to extend the lien of said receiver's certificates over those lands or to make the said certificates a prior and paramount lien thereupon; that said certificates at the time of their issue were null and void, so far as they purported to be a lien upon the said lands conveyed by the Birdseye trust deed, and there was never attached to them any right of priority of payment before the bonds secured by said Birdseye trust deed; that when the said circuit court undertook to audit and settle the accounts of the said receiver such auditing and settlement was without jurisdiction and void, so far as it related to the rights of Jonathan Tremaine Wells as the owner and holder of said bonds so as aforesaid purchased by him. Neither said Jonathan Tremaine Wells nor any other of the Birdseye bondholders, except those represented by said Russell as aforesaid, were parties to said Sutherland

suit, nor had they any notice of said proceeding for the appointment of said receiver or the creation of the said receiver's certificates, and the plaintiff charges that said Birdseye, trustee, was not by his deed of trust or in any manner authorized or empowered to represent them or to act for them in respect thereto.

Twenty-sixth. Said Birdseye, trustee, allowed said paramount lien to be apparently imposed upon the land grant he represented, and failed at any time to apprise the bondholders secured by his deed of trust of the action of the court in the premises, although he knew such action to be brought about by the attempt of said Russell, acting as solicitor aforesaid, to extend the lien of the said certificates over the lands covered by his mortgage or deed of trust, and that said Russell represented only a very small portion of the bondholders thereunder, and that said Russell was acting solely in the interests of the said parties whom he represented, to the sacrifice of the interest of all the other bondholders secured under said deed of trust. The nominal amount of said receiver's certificates was illegally and fraudulently increased for the sole purpose of making the receiver's debt as large as possible and, by means thereof and through the decree which was expected in said suit, of obtaining the entire property of the said canal company and destroying the interests of the other bondholders and parties secured under the said deeds of trust, who were not in league with the said Theodore M. Davis and his confederates aforesaid. The accounts of said receiver were afterwards audited and confirmed by the court; but the said Jonathan T. Wells was not a party to the said accounting, and plaintiff charges that the same was without jurisdiction as to him.

Twenty-seventh. The Birdseye trust deed, of date July 1, 1868, wherein the Portage Lake and Lake Superior Ship Canal Company was party of the first part and said D. Randolph Martin and Thomas T. Davis were parties of the second part, contained the following provision, to wit:

"That it shall be lawful for the said party of the second part, their survivor or successors, and it shall be his or their duty so to do from time to time and at all times when requested thereto by said party of the first part, to release to the said party of the first part from the operation and incumbrance of this mortgage any of the lands herein mortgaged, the same being part of the lands granted to the said party of the first part by the said act of Congress July 3d, 1866, upon said party of the first part delivering up to the said party of the second part, their survivor or successors, to be cancelled, bonds hereby secured equal to the payment for said lands to be released at the rate of five dollars an acre."

Which said mortgage and trust deed was the first lien upon the property therein described as aforesaid. The said McCarter trust deed, of date July 1, 1870, wherein the said Portage Lake and Lake Superior Ship Canal Company was party of the first part and Charles L. Frost was party of the second part, being the second mortgage on the property described in said Birdseye trust deed and other property, contains the following provision, to wit:

16 "And the said party of the first part, for itself, its sucessors and assigns, also covenants and agrees to and with the party of the second part and his successor and each and every holder of any one or more bonds hereby secured that under and by virtue of the clauses and provisions in the mortgage or deed of trust to D. Randolph Martin and Thomas T. Davis, trustees, hereinbefore referred to, relative to the releasing from the incumbrance thereof and of the lands of the grant July 3, 1866, hereby mortgaged, the said party of the second part or his successor in office as trustee, or any holder of one or more of the bonds secured by this deed, may at any and all times require the party of the first part to procure, in the mode provided in said mortgage or deed of trust, a release or releases from the incumbrance thereof of any of the lands mortgaged hereby; and that whenever the said party of the second part or his successor as trustee, or any one of the holders of one or more of the bonds hereby secured, shall make such requirement in writing, specifying and describing the lands which may be so sought and desired to be released, and shall furnish and tender to said party of the first part, either in cash or in bonds secured by the said mortgage or deed of trust to said D. Randolph Martin and Thomas T. Davis, a sum equivalent to the lands so specified at five dollars an acre, said party of the first part shall pay or deliver the same to the said D. Randolph Martin and Thomas T. Davis, trustees, or the survivors of them or their or his successors or successor, and procure such release therefrom of the lands so specified and desired to be released; and the party of the first part hereby constitutes and appoints the said Charles L. Frost, trustee, or his successor in this trust, its true and lawful attorney, irrevocable, with power of substitution at any and all times, to do any and all necessary acts and things in the name of the said party of the first part or otherwise to procure a release or releases of any of said lands from said mortgage, under the provisions and stipulations for that purpose therein contained, and it hereby authorizes, requests, and directs said D. Randolph Martin and Thomas T. Davis, trustees, or the trustee or trustees of said mortgage for the time being, to make, execute, and deliver to all or any of the holders of the bonds herein secured at any and all times such release or releases of any of the lands described and included in said mortgage from the incumbrance thereof as may be desired and required to be released by said holders of said bonds hereby secured on receiving from him or them in cash or in bonds
17 secured by said mortgage a sum equivalent to the lands sought to be released at five dollars an acre.

And the party of the first part forther covenants that the sum or sums which in cash or bonds may be in any manner as above described used and appropriated by the said party of the second part or by the holder or holders of any of the said bonds hereby secured in procuring such release or releases shall be added to and deemed a part of the principal sum secured to be paid by said bonds held by the person or persons so using or appropriating the same, and the same shall become forthwith due and payable and the party of the first part hereby agrees to pay the same: Provided, however,

That the land or lands so released from the encumbrance of said mortgage to D. Randolph Martin and Thomas T. Davis shall still, after such release, be owned by the said party of the first part, subject only to the incumbrance hereby created to the amount of the bond or bonds hereby secured, owned by the person or persons procuring such release, with the amount of money or bonds secured by the mortgage to said D. Randolph Martin and Thomas T. Davis, given for such release, added thereto."

Twenty-eighth. On or about the 11th day of August, 1873, the said Jonathan Tremaine Wells, being the owner and holder of forty bonds mentioned, described, and secured by the said McCarter trust deed, for the principal sum of one thousand dollars each, besides interest as aforesaid, deposited the same with Lucien Birdseye, as trustee under the said Birdseye trust deed, together with a certain instrument in writing, duly executed and signed by him, requesting that certain lands, amounting to eight thousand acres, hereinafter more particularly described, which are a part of lands covered by and described in the Birdseye and McCarter deeds of trust aforesaid, be released and discharged from the operation of said Birdseye trust deed in pursuance of the terms and provisions as aforesaid therein contained, and at the same time tendered to said Lucien Birdseye as such trustee for cancellation, and as and for the payment for said release so requested eighty bonds, each of the denomination of five hundred dollars of principal, held and owned by said Jonathan Tremaine Wells as aforesaid, which bonds were issued and secured by said Birdseye trust deed and were equivalent to said eight thousand acres of land, of which said Jonathan
18 Tremaine Wells requested a release as aforesaid, at the rate or price of five dollars per acre. Said Lucien Birdseye, as such trustee, on or about the said 11th day of August, 1873, accepted said eighty bonds so as aforesaid tendered, and the same were delivered to him, and in and by his instrument in writing of that date as such trustee, duly signed, sealed, acknowledged, and delivered to the said Jonathan Tremaine Wells, remised, released, acquitted, and discharged said eight thousand acres of land of and from all the lien, charge, claim, incumbrance, and operation of said Birdseye trust deed, except only the bonds so as aforesaid held and owned by said Jonathan Tremaine Wells and so as aforesaid surrendered to be canceled for the purpose of procuring said release.

And this plaintiff alleges that the deposit of the said eighty bonds secured under the Birdseye trust deed added their sum to the principal sum of the forty bonds secured by the McCarter trust deed, purchased by said Wells as aforesaid, and that the aggregate sum of said one hundred and twenty bonds, to wit, the sum of eighty thousand dollars, with interest, became thereby immediately due and payable, in accordance with the provisions of the said deed of trust. Said instrument in writing was thereafter duly accepted by the said assignees in bankruptcy of the said The Lake Superior Ship Canal, Railroad and Iron Company and was duly recorded in the offices of the registers of deeds in the counties in the State of

ing Michigan where such lands are situated. A copy of said release is hereto annexed and marked "Exhibit D."

Twenty-ninth. And plaintiff alleges that the effect of said instrument of release and of the proceedings had by said Wells, as hereinbefore averred, was to release and discharge the eight thousand acres of land therein described from all the debts created under and secured by said Birdseye and McCarter trust deeds, except the eighty bonds surrendered as aforesaid by said Jonathan Tremaine Wells and the forty bonds secured under the McCarter trust deed, deposited by him as aforesaid; and that the said eight
19 thousand acres thereupon became subject to a first-mortgage incumbrance or lien in favor of said Jonathan Tremaine Wells and no other person for said sum of eighty thousand dollars and interest and no more; and that the said land thereupon became released and discharged from the lien of any other of the said deeds of trust, and the remainder of the property described in and by said deeds of trust thereupon became and was free and discharged from any lien for said sum of eighty thousand dollars and interest.

Thirtieth. In the month of September, 1873, the said George Jerome and Fernando C. Beaman, assignees aforesaid, filed a bill in the circuit court of the United States for the eastern district of Michigan against John L. Sutherland, trustee; Lucien Birdseye, trustee; Thomas N. McCarter, trustee; the Union Trust Company, trustee; the said Jonathan Tremaine Wells, Frederick D. Tappan, trustee, and others. Said bill sets forth in detail the facts relating to the execution and delivery by said Lucien Birdseye, trustee, to said Jonathan Tremaine Wells of said instrument of release, of date August 11, 1873, substantially as herein alleged. Said last-mentioned bill prays, among other things, that said release to Jonathan Tremaine Wells be declared valid and of the legal effect charged in said bill, which was to the effect hereinbefore alleged; that proceedings in the said foreclosure suits then pending may be stayed, and that the said Sutherland suit, with said last-mentioned bill treated as a supplemental or cross-bill, might proceed regularly to a decree; that an interlocutory decree might be entered in the said Sutherland suit and in the suit so brought by said Jerome and Beaman, treating them as original and cross-suits. It also prays for the appointment of a master to inquire and report as to the manner in which the property covered by said several mortgages should be offered for sale so as to protect and advance the interests of all parties, and who should be authorized to advertise and receive proposals for the purchase of said property; and that upon the coming in of said report a decree might be made directing and providing for a
20 sale of said property in parcels, either by said complainants, as assignees, or by an officer of the court, in accordance with said report, or in such other manner as to such court should seem best, and that the proceeds of such sale be brought into court.

It also prays that said court should cause proper proceedings to be taken to notify and require all proper parties holding any of the bonds secured by the said mortgages and any of said certificates so

issued by said receiver to present and prove the same, giving to said complainants and any other person or persons interested in that behalf the right to dispute, either wholly or in part, the right of any person presenting and claiming any such bonds and certificates.

Thirty-first. The defendants, John L. Sutherland, trustee; Thomas N. McCarter, trustee; Frederick D. Tappan, trustee, appeared in said last-named suit, by said Alfred Russell, as their solicitor, and filed answers to said bill. The defendant, Lucien Birdseye, trustee, appeared therein and filed an answer to said bill, wherein he admits and realleges the allegations contained in said bill relating to the claims of the said Jonathan Tremaine Wells by virtue of said instrument of release, dated August 11th, 1873. The defendant, Jonathan Tremaine Wells, appeared therein, by William L. Avery, his solicitor, and on or about the 30th day of December, 1874, said William L. Avery, as such solicitor, stipulated that said bill filed by Jerome and Beaman be taken *pro confesso* against said Jonathan Tremaine Wells. Issue was joined and a large amount of testimony was taken and filed in the said several suits hereinbefore referred to.

But none of the testimony so taken had any bearing whatever upon the effect of said instrument of release, and the validity thereof was admitted upon the record as aforesaid.

Thirty-second. During the latter part of 1876 or the early part of 1877 the said Alfred Russell, as the agent, attorney, and solicitor of the said parties, J. Boorman Johnston & Co., J. C. Ayer & Co., Theodore M. Davis, receiver, and other parties who had become interested with them in their efforts to secure a title to the property of the canal company aforesaid, with the knowledge of said parties, entered into a fraudulent conspiracy for the purpose of pro-
21 curing from said circuit court the entry of a decree, by means of which the interest of said Jonathan T. Wells in said eight thousand acres of land should be divested and the value of his said bonds destroyed, and the entire property and assets of said The Lake Superior Ship Canal, Railroad and Iron Company vested in the parties in this article mentioned to the exclusion of said Wells.

It was agreed by said parties that upon the sale of the property, to be made in pursuance of said proposed decree, that such property should be purchased by Nathaniel Wilson and Albon P. Man, as trustees, in the interest and for the benefit of the said parties to said fraudulent agreement; that a company should be organized under the laws of the State of Michigan for the purpose of taking and holding the property formerly held by the said canal company, which was to be transferred to said company by said Wilson and Man when so organized, and that upon the completion of said transfer the parties aforesaid to said fraudulent agreement would endeavor to sell the said property or the stock of the new corporation to English capitalists, and, failing in this, the stock of said corporation should be divided among the several parties to such agreement in certain specified shares and proportions.

Thirty-third. Accordingly and in pursuance of the said fraudulent arrangement and conspiracy the said Alfred Russell, while act-

as the agent, attorney, and solicitor of the parties above named, and also the solicitor of record of the several trustees in the said suits as aforesaid, appeared before the Hon. H. H. Emmons, one of the judges of said circuit court, on or about the twelfth day of February, 1877, at Detroit, Michigan, and procured from the said judge, who was then seriously sick and confined to his house, an order providing that the said bill filed in said suit brought by Jerome and Beaman be considered as a cross-bill to all the other of said causes; that all the said causes be brought on for a hearing together upon the pleadings and proofs in all of said causes; that the proofs in each cause be considered and treated as introduced in all, and at the same time and place procured from the said judge the entry of a final decree in the said several suits, a copy of which order and decree
22 are hereunto annexed and marked "Exhibits E and F." Said decree, among other things, contained the following clause:

"Twenty-first. It is hereby ordered, adjudged, and decreed that the attempt of the defendant, Jonathan T. Wells, to redeem or obtain release of certain lands from the lien of the mortgage of the first of July, 1868, and the alleged release of said land by Lucien Birdseye, trustee, as set forth in said cross-complaint, having taken place after the institution of the suit for the foreclosure of said mortgage, were and are ineffectual and void."

Thirty-fourth. The entry and signing of said order and decree were procured secretly and without notice to the said Jonathan Tremaine Wells or to his said solicitor. The said judge was induced to sign the said decree upon the representations that said decree was entered merely for the purpose of enabling the said mortgaged property to be sold to certain English capitalists, who were ready to pay money enough to satisfy all the debts and claims against the said bankrupt corporation, and that said decree would be satisfactory to all parties of the record. Said decree, though purporting to be entered upon proofs and after hearing, in reality paid no regard or attention to the pleadings in said suits or to the proofs upon file in the same, and no hearing was had before the said judge upon any of the questions involved in the issues and proceedings in said suits, and plaintiff alleges that said decree was not a judicial determination of the rights of all parties, but was a contrivance to enable the parties to the aforesaid conspiracy and fraudulent agreement to get possession of the property and use it for their own purposes, as hereinbefore stated.

The property disposed of under said decree was insufficiently advertised and was sold in bulk, and in consequence realized a much smaller sum than it would have done if properly advertised or sold in parcels. None of the bondholders except those who were parties to said conspiracy were informed of the entry of said decree, and all knowledge of the same and of its contents was purposely kept from the said Jonathan Tremaine Wells in order to enable the parties to the said conspiracy to carry out their said plans before the
23 other bondholders could interfere in defense of their rights.

Said twenty-first clause of said decree was wholly unwarranted by and contrary to the pleadings and proofs in the said causes, and

is without jurisdiction and void as to the said Jonathan Tremaine Wells, who was never heard and never had the opportunity to be heard respecting the same.

Thirty-fifth. The said Jonathan Tremaine Wells was during all the times herein mentioned a resident of the city of Brooklyn, State of New York. He died in said city on or about the 16th day of October, 1881, at the age of about eighty-two years. For three years and upwards immediately preceding his death he was feeble in body and mind, and by reason thereof was unable to travel to Michigan, where the litigation hereinbefore referred to was carried on, or to give his personal attention to his interests therein.

Thirty-sixth. That on or about the 14th day of March, 1879, the said Jonathan Tremaine Wells, by a certain deed of trust under his hand and seal, sold, assigned, transferred, and set over unto James H. Gilbert all his real and personal property and choses in action, in trust for the benefit of the said Jonathan Tremaine Wells and his legal representatives. Knowledge of the making and entry of said decree was first acquired by said Jonathan Tremaine Wells and by said James H. Gilbert, trustee as aforesaid, during the month of May, 1879.

It has been exceedingly difficult and has required much time to ascertain the facts in relation to the proceedings herein related on account not only of the many and protracted litigations involving the rights of the many bondholders of the company, but especially of the great efforts made by the parties to the fraud aforesaid to suppress everything tending to throw light upon their transactions and to hamper and impede investigation by withholding or concealing whatever might give information to Wells or his representatives.

Thirty-seventh. On the 10th day of March, 1882, a petition was filed in the circuit court of the United States for the eastern district of Michigan, on behalf of said James H. Gilbert, trustee as aforesaid,
and an application for relief against said last-mentioned decree
24 was made thereon. The said application was heard by the Honorable Stanley Matthews, one of the judges of said circuit court, and an order made denying the application but without prejudice to the merits of the application or proceeding to be taken thereafter in the interest of the estate of said Jonathan Tremaine Wells.

Thirty-eighth. At about the time of the making and entry of said decree, or immediately thereafter, said J. Boorman Johnston & Co., Theodore M. Davis, receiver aforesaid, and the representatives of the said firm of J. C. Ayer & Co., for the purpose of carrying into effect the said fraudulent arrangement and conspiracy so made as aforesaid, entered into two separate agreements in writing with Don M. Dickinson, said Albon P. Man, and Nathaniel Wilson, dated, respectively, April 9, 1877, copies of which said agreements are hereunto annexed and marked "Exhibits G and H." In pursuance of said fraudulent arrangement and conspiracy and to carry the same into effect, said Alfred Russell, acting in their behalf, induced the master appointed by said decree to sell said mortgaged premises to fix the earliest day possible for the sale thereof, and said sale was accord-

ingly advertised to take place on the 27th day of April, 1877, in but a single newspaper of very limited circulation, which was published in the village of Houghton, Michigan. Prior to that date certain holders of bonds under the Birdseye trust deed requested of said Davis and the other parties to said combination that said sale might be properly advertised in newspapers of general circulation published in some of the large cities of the country, and that the sale should be adjourned so as to enable the other bondholders to combine and protect their interests and to form a combination of capitalists to bid at such sale. Said Davis and said other parties utterly refused to grant a longer adjournment than for two weeks, and utterly refused to advertise the sale in any other manner; and on the eleventh day of May said premises were sold by said master, after a protest read at the sale, in behalf of said bondholders against the sale being made without adequate advertisement, and notice was given to said parties that said sale, if made, would be objected to and confirmation thereof by the court
25 opposed. Said master, under the direction of said Russell, acting as said solicitor, failed to mention the terms of payment in his notice of the sale, but announced at the sale that payment of the entire bid must be made then and there, not allowing to the purchaser time for the examination of the title, and imposed other onerous and severe terms and conditions which rendered it practically impossible for any one to bid for or to buy the premises, except the parties to the aforesaid conspiracy, and also violated the aforesaid decree by not selling the franchise and ship-canal property separate from the land covered by the Birdseye trust deed, although well knowing that said franchise and ship canal, as a separate property, were of great value. No notice whatever of the sale of the said franchise and ship-canal property as made was ever given by the said master.

Thirty-ninth. In pursuance of the objects of said arrangement and conspiracy and in accordance with the provisions of said agreements of date April 9, 1877, said Man and Wilson became the purchasers of the premises covered by the Birdseye trust deed and of the entire property and assets of the said Lake Superior Ship Canal, Railroad and Iron Company for the sum of five hundred and fifty thousand dollars, and they paid said sum therefor under the terms of said decree entirely in receiver's certificates issued as aforesaid. On the 14th day of May, 1877, the parties to said conspiracy, acting through the said Russell as their attorney and representative, procured the master's report of said sale to be filed, and by their falsely representing to the solicitors of the other parties to said suits that the immediate confirmation of said master's report was necessary to consummate the sale of said premises to the English capitalists and for the payment of the debts of said canal company, and that all parties in interest desired an immediate confirmation of said sale, they obtained an order confirming said sale before the thirty days within which, by the rules of the said court, objections might be filed. They also, when making such false representations, fraudulently supposed the fact of said protest and of said notice given at

the sale; thereupon said master executed a deed of the said premises to said Man and Wilson.

26 Fortieth. On or about the 15th day of May, 1877, in accordance with said fraudulent arrangement and conspiracy and in pursuance of said agreements of date April 9th, 1877, the said Theodore M. Davis, Albon P. Man, Nathaniel Wilson, George W. Debevoise (who acted as the agent and attorney-in-fact of J. C. Ayer & Co.), Gordon Norrie (who acted as the agent and attorney-in-fact of Boorman Johnston & Co., and was formerly a member of said firm), and said Don M. Dickinson and Schuyler F. Seager filed under their several names articles of association in the office of the secretary of state, in Michigan, and organized a corporation, pursuant to the laws of said State, under the name of the Lake Superior Ship Canal, Railway and Iron Company, and became and still are the trustees, officers, and stockholders of said corporation.

The amount of the capital stock of said corporation was by the said articles of association stated to be eight millions of dollars, but the same was afterwards reduced to four million dollars. The said Theodore M. Davis became and now is president of said new corporation. The general purpose of said corporation was to exercise the franchises and rights and to take the property formerly owned by the Lake Superior Ship Canal, Railroad and Iron Company, and thereafter a conveyance of all the said property and rights purchased as aforesaid by Man and Wilson in the interests of said parties was made to the said Lake Superior Ship Canal, Railway and Iron Company. Plaintiff alleges that the said corporation as organized had notice of the frauds, irregularities, and proceedings set forth in this complaint, and took title to said premises subject to any and all rights of the said Jonathan Tremaine Wells, as herein set forth.

Forty-first. That after the execution of said release by Lucien Birdseye, trustee as aforesaid, Thomas N. McCarter became and was seized of the lands in said release described in fee simple in trust for the said Jonathan Tremaine Wells, and in further trust to sell the said lands, and out of the proceeds thereof, after defraying the costs and expenses of such sale and his own charges and expenses, to pay to said Wells the sum due upon his said bonds, to wit, the sum of

27 eighty thousand dollars and interest as aforesaid; that it was also his duty as such trustee to cause the said lands to be suitably advertised upon such sale, so that the land should bring its full value; that it was also his duty as such trustee to use due and reasonable diligence to oppose and if possible prevent the creation or maintenance of any lien upon the same which should be a prior lien to that of the said Wells; that the said Theodore M. Davis, J. Boorman Johnston and Co., and J. C. Ayer and Co. took upon themselves the performance of the duties of such trustee with full knowledge of the nature and extent thereof, and they wholly failed and neglected to perform each and every of them. The said land at the time of said sale was reasonably worth at least one hundred and fifty thousand dollars. Said amount could, if they had exercised reasonable diligence in and about the sale thereof, have

been realized therefrom; that they became and were, by reason of their taking upon themselves the performance of the duties of such trustee, trustees for said Wells, and had no right, power, or authority to buy said land; nevertheless, they, by their agents, the said Man and Wilson, did buy the same, and have since caused the same to be conveyed as aforesaid to the defendant company, and they are now interested in the same by reason of their ownership of the stock of said company. They have sold a portion of said land to *bona fide* purchasers for value, and have received the purchase-money thereof to a large amount; that they and said company have thus become and are liable to pay to this plaintiff the full amount due upon the bonds aforesaid, to wit, the sum of eighty thousand dollars, with interest as aforesaid.

Forty-second. The Lake Superior Ship Canal, Railroad and Iron Company, by reason of the fraudulent contrivances aforesaid, was divested of the legal title to its entire property and assests, and the remedy and right of action of said Wells against said company on the said bonds so held by him was destroyed and rendered worthless; and the plaintiff is without remedy in the premises unless he can set aside the said fraudulent decree under color of which defendants have acquired their title to said property.

Wherefore this plaintiff prays—

28 First. That the said decree made and entered as of date the twelfth day of February, 1877, may be adjudged to be without jurisdiction, fraudulent, null, and void, in so far as the provisions thereof declare the release given to said Jonathan Tremaine Wells, as hereinabove set forth, to be void, ineffectual, or in any manner irregular, and not of the full legal effect herein charged, and in so far as the provisions of said decree give to the said receiver's certificates a paramount lien upon those lands covered by the Birdseye trust deed, of date July 1, 1868, which were released to the said Jonathan Tremaine Wells in and by said instrument of release, or so far as the provisions of said decree give any right of prior payment out of the moneys arising from the sale or other disposition of the property described in said release and covered by the said Birdseye trust deed as against the bonds held by said Jonathan Tremaine Wells as aforesaid or against his claims under said release, and so far as said provisions give any validity whatever to the said receiver's certificates as a payment for said lands or any part thereof.

Second. That the sales of the said property granted to said canal company under the said act of Congress of July 3, 1868, and included in the Birdseye trust deed, of date July 1, 1868, and particularly described in the said deed of release to Jonathan T. Wells, and the deeds thereof executed by the master to said Man and Wilson and by them to the aforesaid corporation, may be declared to be in trust for the said Jonathan T. Wells.

Third. That this plaintiff, as trustee and executor of the last will and testament of the said Jonathan Tremaine Wells, may be declared to succeed to all the rights of said Wells in the premises, to the end that he may be adjudged to have the first and paramount

lien upon the said eight thousand acres of land described in said instrument of release, to the extent of the principal sum of said one hundred and twenty bonds, with interest thereon, described in said release and owned and held by said Wells as aforesaid, to wit, the sum of eighty thousand dollars, with interest as aforesaid.

Fourth. That the defendants may be adjudged to account
29 to this plaintiff for the profits they have made by reason of their fraudulent dealings aforesaid with the property so held in trust for said Wells, and for compound interest thereupon, and that they may be adjudged to pay to this plaintiff whatever sums of money may be found upon such accounting to be owing from them to this plaintiff.

Fifth. That the defendant, The Lake Superior Ship Canal, Railway and Iron Company, may be enjoined and restrained from transferring upon its books any of the stock in said company held by the defendants or any of them and from selling, incumbering, or transferring any of the property held by it by virtue of the fraudulent proceedings aforesaid.

Sixth. That the defendants, The Lake Superior Ship Canal Railway and Iron Company, Theodore M. Davis, J. Boorman Johnston, Isaac H. Knox, and Gordon Norrie, individually and as survivors of the firm of J. Boorman Johnston & Co.; Frederick Ayer, individually and as sole survivor of the firm of J. C. Ayer & Co.; Frederick F. Ayer, Josephine Ayer, and Benjamin Dean, administrators with the will annexed of the estate of James C. Ayer, deceased, and Thomas N. McCarter, be adjudged to pay to this plaintiff said sum of eighty thousand dollars, with interest as aforesaid.

Seventh. That this plaintiff may have such other and further relief in the premises as may to this court seem equitable and just, together with the costs of this action.

TUDOR S. JENKS,
Plaintiff's Attorney.

CITY AND COUNTY OF NEW YORK, *ss:*

Andrew W. Kent, being duly sworn, deposes and says: I am the plaintiff named in the foregoing complaint. I have read the same and know the contents thereof. The said complaint is true of my own knowledge, except as to the matters therein stated on information and belief, and as to those matters I believe it to be true.

A. W. KENT.

Sworn to before me this 7th day of February, 1884.

ALFRED P. W. SEAMAN,
Notary Public, Queens Co., N. Y.

(Certificate filed in N. Y. Co.)

30 EXHIBIT A.

Portage Lake and Lake Superior Ship Canal Company.

Trust Deed.

An indenture made and entered into the first day of July, one thousand eight hundred and sixty-five, by and between the Portage Lake and Lake Superior Ship Canal Company, a corporation existing under the laws of the State of Michigan, party of the first part, and Columbus C. Douglass, of the city of New York, trustee, party of the second part.

Whereas the party of the first part, by act of incorporation executed the fifth day of July, 1864, in accordance with the act of the Legislature of the State of Michigan entitled "An act to provide for the formation of companies to construct canals or harbors and improve the same," approved March 13, 1861, has become entitled to valuable franchises, rights of way, lands, and property, including the right to locate, establish, construct, and use, and to enforce tolls for the use of the same, a certain ship canal from Portage Lake to Lake Superior through the neck of land called the "Portage;"

And whereas the State of Michigan did become entitled to certain other valuable franchises, rights of way, lands, and property, to wit, the right of locating and constructing a breakwater and harbor and ship canal through any public lands at or upon the neck of land on Lake Superior known as the "Portage;"

And whereas the State of Michigan, for the purpose of locating and constructing said canal and harbor, became entitled to one thousand feet of land on the shores of Lake Superior and four hundred feet of land on the shores of Portage Lake, on said neck of land called the "Portage;" and whereas the Congress of the United States of America, in the same act by which the aforesaid rights,
31 franchises, and privileges were granted to and conferred upon the said State of Michigan, did by said act entitled "An act granting land to the State of Michigan to aid in building a harbor and ship canal at Portage Lake, Kewenaw Point, Lake Superior," grant to said State, for the purpose of aiding said State in constructing and completing a harbor and ship canal to connect the waters of Lake Superior with the waters of Portage Lake, two hundred thousand acres of public land, to be selected from any lands in the upper peninsula of said State subject to private entry;

And whereas the State of Michigan, by act of the Legislature of said State entitled "An act to accept a grant of land by act of Congress to aid in the construction of the ship canal at the head of Portage Lake with Lake Superior, and to provide for the construction of the same," approved March 18, 1865, did accept said grant of land, together with all the rights, powers, privileges, and franchises, by said act of Congress granted said State, and did grant said lands to and confer the same, together with all other the rights, franchises,

and privileges, upon the said Portage Lake and Lake Superior Ship Canal Company;

And whereas the said State of Michigan, by virtue of the said act aforesaid approved March 18, 1865, did, in addition thereto, for the purpose of aiding said Portage Lake and Lake Superior Ship Canal Company to construct and complete said ship canal, authorize and empower said Portage Lake and Lake Superior Ship Canal Company to hypothecate and mortgage said lands, franchises, privileges, and rights of way; and whereas the party of the first part, by virtue of said acts and by virtue of the acts of incorporation, is, among other things, expressly empowered to borrow money and issue bonds or other evidences of debt to secure the same, and to mortgage, pledge, or otherwise dispose of all its rights, title, claim, or demand of, in, or to any lands granted to said company, and in any other estate, real, personal, or mixed, of which it may be
32 seized at the time of the execution of such mortgage or which it may acquire subsequent thereto, in such manner and on such terms as the directors may think proper;

And whereas the party of the first part, for the purpose of completing the said ship canal, has determined to obtain a loan to the amount of five hundred thousand dollars upon the terms and security herein mentioned, and for that purpose to issue its bonds, to be secured by mortgage of the said ship canal and its equipments, appendages, rights, franchises, tolls, and income, and to be further secured by the mortgage of two hundred thousand acres of land as aforesaid granted to said ship canal company by said act of Congress and by said act of the Legislature of the State of Michigan, and upon the income and property of said corporation now existing or hereafter to be acquired, and to sell and dispose of said bonds—that is to say, 1,000 bonds of $500 each, to be numbered from 1 to 1000—each of said bonds to be of even date herewith and to provide for the payment of the principal on the first day of July, 1875, at the Ocean Bank, in the city of New York, and for the payment of interest on such principal at the rate of ten per cent. per annum semi-annually on the first days of January and July in each year, at said Ocean Bank, in the city of New York, on presentation or surrender of the interest warrants or coupons to be annexed to such bonds, which bonds shall be duly executed under the seal of the company and by the president and secretary thereof, and the said coupons authenticated by the signature or initials of said secretary, and each of which bonds shall also be certified by the party of the second part to be one of the bonds secured by the present indenture:

Now, therefore, this indenture witnesseth: That the party of the first part, to secure the payment of the said bonds or obligations and the interest thereon, and the performance of the covenants on its part hereinafter contained, and in consideration of the premises and of one dollar to it in hand paid by the party of the second part
33 at the time of the execution thereof, the receipt of which sum is hereby acknowledged, hath granted, bargained, sold, assigned, set over or released, conveyed, and confirmed, and hereby doth grant, bargain, sell, assign, set over or release, convey, and

confirm, unto the said party of the second part all and singular the canal aforesaid, constructed or to be constructed, with all the rights and franchises growing out — or appertaining to said canal, together with the income, profits, or tolls to be collected, received, or enjoyed by the said party of the first part or in anywise belonging to said party of the first part for the use of said canal; and also all the lands and hereditaments acquired, appropriated to, or anywise belonging to the said party of the first part, and the said two hundred thousand acres of land so as aforesaid acquired by the said party of the first part by grant to the State of Michigan as aforesaid and by the said State of Michigan granted to the said party of the first part as aforesaid; and also all and singular the vessels, tugs, dredges, and equipments of said party of the first part which shall now or shall hereafter be owned or acquired by the party of the first part; and also all other goods and chattels now owned or which shall hereafter be owned by the party of the first part in any way relating to or appertaining to or connected with said canal or the using or operating the same, together with all rents, income, issue, profits, moneys, rights, benefits, and advantages derived or which may in any way be derived from the premises:

To have and to hold all and singular the premises, rights, franchises, property, real and personal, aforesaid, with the appurtenances, unto the said party of the second — and the successor of him, in trust, however, for the persons, firm or firms, and bodies politic or corporate who have been heretofore or shall hereafter at any time become and be, from time to time, the purchasers or holders and owners of the aforesaid bonds or any or either of them, subject, however, to the possession and management of said canal and property, including rents, incomes, issues, and profits aforesaid, by said party of the first part, successors or assigns, so long as no default shall be made in the payment of either principal or interest of the bonds or any of them, and so long as said party of the first part shall well and truly observe, keep, and perform all and singular the covenants and conditions in said bonds and in this indenture expressed to be observed, kept, or performed by or on behalf of said party of the first part.

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But nothing herein contained shall be construed to prevent the party of the first part from selling, hypothecating, or otherwise disposing of any bonds, mortgages, or other securities which may be received in payment for stock or by way of loan to said company, nor from collecting moneys due the party of the first part on stocks, subscriptions, or for any other ordinary indebtedness, provided in all such cases it shall proceed diligently to collect and faithfully to apply all such means to the construction, equipment, or operation of said canal or the payment of any lien, debt, interest, or necessary expenses of or against the same; and provided, also, that no default shall have been made in the payment of the interest or principal of the said bonds or any of them.

The trusts, uses, and purposes upon which the premises, rights, franchises, and property, real and personal, aforesaid are conveyed to and are to be had, held, and disposed of by the party of the second

part, the successor of him, are as follows—that is to say: In case the party of the first part shall fail to pay the principal or any part thereof or any of the interest on any of the said bonds at any time when the same may become due and payable according to the tenor thereof, then, after sixty days from such default and upon the written request of the holders of any fifty of the said bonds, the party of the second part, the survivor and successor of him, may —, and they are hereby, authorized and empowered to enter into and upon and to take actual possession of all and singular the aforesaid canal, premises, franchises, rights, and property, real and personal, and effects hereby granted, con-
35 veyed, assigned, mortgaged, pledged, transferred, and set over, or intended so to be, and (until sale thereof), by themselves or their agents or substitutes, to have, use, and employ the same, collect and receive tolls, income and profits, receipts and earnings thereof and of every part thereof or to be derived therefrom, making from time to time, in their full discretion, all needful repairs, alterations, and additions thereto, and after deducting the expenses of such use, repairs, alterations, and additions and their costs, charges, and expenses to apply the receipts, tolls, income, earnings, and profits of the said canal and the appurtenances toward the payment of the interest and principal of all said bonds remaining unpaid; and in such case the agent or agents of said canal actually in possession thereof are hereby ordered to give such possession to the party of the second part, the survivor and successor of him.

And on such default and after such lapse or time thereafter as aforesaid the party of the second part, the survivor and successors of him, may and, upon the written request of the holders of at least one-twentieth in amount of the said bonds or such of them as shall have been actually and in good faith negotiated and issued and shall then remain unpaid, shall —, and they hereby are, authorized and empowered to cause to be sold the said canal, premises, franchises, rights, and property, real and personal, of every character, or so much thereof as shall be necessary to pay and discharge the principal and interest of all such of the said bonds issued and negotiated as aforesaid as may then remain unpaid, at public auction, either at the village of Houghton, in the State of Michigan, or in the city of New York, giving at least thirty days' notice of the time, place, and terms of such sale and of the specific property to be sold by publishing the same in a newspaper printed in or nearest said village of Houghton at least once in each week and a newspaper in the city of New York daily (Sundays excepted), and to execute to the purchaser or purchasers thereof a good and sufficient deed or
36 deeds of conveyance in fee simple for the same, including all the franchise aforesaid, and which sale shall be a bar against the party of the first part and its successors and assigns and all persons claiming under it of all right, interest, or claim in or to the said premises or any part thereof; and the party of the second part and the survivors and successors of him shall, after deducting from the proceeds of such sale the costs and expenses thereof and of the management of said property and his own costs and charges and

expenses, apply the balance, so far as the same will go, to the payment of the principal and interest of those of the said bonds which shall then be unpaid, and return the residue thereof (if any) to the party of the first part, its successors or assigns: Provided, nevertheless, That if, in the judgment of said party of the second part, his survivors or successors, it will be more conducive to the interest and protection of the holders of said bonds to buy in said mortgaged premises or any part thereof at such sale on behalf of the said bondholders and in trust for them, then it shall be lawful for the said party of the second part, his survivor or successors, as such trustee, to make such purchase for such purpose and in trust for said bondholders, unless the party of the first part or some other party or parties shall at such sale pay or offer and secure to be paid (to their satisfaction) the full amount then due or secured upon all the said bonds, with all reasonable costs, charges, and expenses then due or incurred in the premises or in or about the proceedings to effect such sale; and, in case of such purchase by the party of the second part, his survivor or successors, they shall thereupon have and hold a full, absolute, and indefeasible title to all and singular the property, premises, and franchises so purchased, but in trust, nevertheless (after payment of all just and legal charges), for the holders of said bonds secured by the present indenture and then remaining unpaid and free from all other trusts and liens, but with full power of management and control for the use of said bondholders
37 until they or a majority of them shall have reorganized said company or shall have authorized a further public or private sale or disposition of the said property by the said trustees.

And it is also provided that the said trustee or his survivor or successors may appoint or employ, at the expense of the party of the first part, all such attorneys, clerks, or agents as they may deem necessary for the proper execution of the trusts and powers hereby created.

And the party of the first part doth further covenant and agree that it will, with all reasonable dispatch and from time to time hereafter, cause to be prepared and delivered to the party of the second part, his survivors or successors, true and full schedules and maps showing the lot numbers and quantity, location, and boundaries of all the lands to which the party of the first part is or may become entitled under or pursuant to any past or future land grants, acts of Congress, or of said State, and showing also the minimum valuation and prices at which the respective parcels may or ought to be sold, verified by the oaths of the president, secretary, and treasurer of said company, or at least two other appraisers of approved competency, and that such schedules and valuations shall from time to time be revised, corrected, and verified in like manner if required by the party of the second part, his survivor or successors.

And it is further provided and agreed that it shall be lawful for the party of the first part, by and with the consent of the party of the second part, his survivor or successors, or upon such terms as shall have been approved by them, to effect sales from time to time of any of such lands at prices not less than the then existing mini-

mum valuation of the same, and such sales may be made either for cash or for any of the bonds aforesaid at not more than their par value, or partly for cash or bonds and partly upon credit, such credit not to exceed five years, and balance in such case to be secured by contract or mortgage; but upon effecting any such sale or sales the same and the terms thereof shall be certified to the party
38 of the second part, his survivors or successors, and upon the completion of any purchase by full payment or payment of part and mortgage for the residue the party of the second part, his survivors and successors, shall and will execute a release of the land so sold, discharging it from the lien of the present indenture, upon receiving or when they shall have received from the purchaser, either directly or through the party of the first part, the full price of the land so sold, or, if the same shall have been sold upon credit, then upon receiving not less than twenty-five per cent. of such price, with the personal obligation of the purchaser for the residue, secured by approved mortgage of the premises so sold.

And it is further provided and declared that the proceeds of all the lands so sold shall constitute a sinking fund for the payment and redemption of the aforesaid mortgage bonds, and it shall be by the party of the second part and his survivors or successors faithfully applied to that object, and until such moneys shall be so applied the same shall be deposited, upon the best terms which can be procured for the same, to the credit of the party hereto of the second part, his survivors or successors, and whenever from time to time there shall be any money so on deposit said party of the second part, his survivors or successors, may, in his discretion, apply the same to the purchase or redemption of so many of the aforesaid bonds as such moneys shall from time to time be adequate to redeem, but at rates not exceeding the par value of the said bonds, it being hereby made the duty of the said trustee to purchase or redeem the same upon such terms as will be most advantageous to the party of the first part, and in case such bonds cannot be obtained and redeemed without paying more than par value, and the said trustees shall have in hand more than $10,000 applicable for that purpose, it shall be his duty to advertise in two newspapers in general circulation in the city of New York, for not less than twenty days, for proposals for the sale or rendition for redemption of bonds to the
39 amount so on hand, and from the proposals so received to accept those which shall be most advantageous to said company.

And the party of the first part doth hereby covenant and agree to and with the said party of the second part and his survivor and successors that the party of the first part will well and truly pay the said bonds and the interest due and to grow due thereon, according to the true tenor thereof, and shall not and will not at any time take or in any manner use, interpose, or avail itself of any injunction or stay of proceedings or any extension laws, stop laws, valuation laws, redemption laws, or any other laws of said State of Michigan now in force or which may hereinafter be in force in said State and which may in any way alter, affect, impair, or change the rights

and interest of the holders of said bonds or of the party of the second part, as herein declared, or which shall in any way impede the mode or manner of realizing or enforcing the said rights and interest or which shall affect or alter the times, place, means, or manner of perfecting, enjoying, or enforcing any of such rights or interests as the same are herein declared, and nothing herein contained shall prevent the party of the second part, the survivors and successors of him, immediately upon default in the payment of the principal or interest of any of the said bonds, from adopting any other legal or equitable remedies not herein specified for foreclosing this mortgage or collecting the amounts which may be due on such bonds.

And that the party of the first part shall and will pay or cause to be paid all taxes, charges, and assessments imposed or assessed or which may hereafter be imposed or assessed upon the said premises, lands, franchises, and property hereby mortgaged, and shall and will do at its own proper cost all things necessary or proper to be done in order to preserve or make effectual the lien and security hereby created or intended to be so created.

And the party of the first part hereby covenants, for the consideration aforesaid, to execute and deliver to the party of the second part, his survivor and successors, any further reasonable and necessary conveyances or instruments for the said canal premises, rights, franchises, and property, real and personal, or any part thereof for more fully carrying into effect the interest hereof, and particularly for the conveyance of any property subsequently to the date hereof acquired by the party of the first part and embraced or intended to be embraced in the description aforesaid; and, further, that at all times until said bonds shall be all fully paid, with the interest due and to grow due thereon, the party of the first part, its successors and assigns, will permit the party of the second part, the survivors, and successors of him or their agents, clerks, or substitutes, freely to inspect all books of account, memoranda, or other papers, books, or reports of such party of the first part, its successors and assigns.

And these presents are upon the express condition that after the payment in full of all the said bonds which shall have been sold or otherwise disposed of and issued, with all interest due and to grow — thereon, these presents and the estate hereby granted shall cease and be void, and the party of the first part shall be immediately and fully reinvested with the said premises hereby granted, in law and in fact, and without any entry or other act whatsoever, and that until default shall be made by the said party of the first part, either in the payment of the said bonds, any or either of them, or in payment of the interest due or to grow — thereon as aforesaid or in keeping and observing any of the covenants and agreements herein contained, the party of the first part, its successors and assigns, shall remain in quiet and peaceable possession and enjoyment of the said premises and property hereby granted and conveyed.

And it is hereby further mutually covenanted by and between the parties hereto that the party of the second part, his successor, shall only be accountable for reasonable diligence in the manage-

ment of said trusts, and shall not be responsible for the acts of any agents appointed by them honestly and in good faith, nor for
41 the acts of each other, and, so far as moneys or property shall be received by them, shall only be responsible for such sums of money or property as shall have *to* come into his hands or under his control, and they shall be entitled to receive and may deduct from any moneys in their hands by reason hereof at any time all their costs, charges, and expenses and proper compensation for every labor or service performed by them in the execution of the trust hereby created.

And it is further provided that the said party of the second part or his successors may at any time, by an instrument under his hand and seal, and which may be recorded where this instrument shall be recorded, resign the trusts hereby created, and that in the case of the death, resignation, or inability of the party of the second part or his successors to act in execution of any of the trusts aforesaid then it shall be lawful for any judge of the supreme court of the States of New York or Michigan to select and appoint, by an instrument under his hand and seal (which shall be recorded in the same office or offices where this instrument shall be recorded), one or more competent person or persons to fill the vacancy so created; and such person or persons so appointed trustee or trustees shall have and possess, either with or without further or other conveyance to him or them, and be vested with the same rights and powers as a trustee or trustees as he or they would have had and possessed or been vested with had he or they been originally made a party or parties of the second part to this indenture, and shall perform the same duties in all respects.

In witness whereof the said party of the first part has caused its president to subscribe and its secretary to attest this indenture and has caused its corporate seal to be hereto affixed, and the party hereto of the second part, for the purpose of signifying his acceptance of the trusts herein and hereby created, has hereto subscribed his name and affixed his seal on the day and year first above written.

J. M. WINSLOW, *President.*
[SEAL.] S. J. EDWARDS, *Secretary.*
COLUMBUS C. DOUGLASS, *Trustee.*

42 EXHIBIT B.

Portage Lake and Lake Superior Ship Canal Company.

Trust Deed.

An indenture made and entered into the first day of July, one thousand eight hundred and sixty-eight, by and between the Portage Lake and Lake Superior Ship Canal Company, a corporation existing under the laws of the State of Michigan, party of the first part, and D. Randolph Martin, of the city of New York, and Thomas T. Davis, of the city of Syracuse, party of the second part.

Whereas the party of the first part, by act of incorporation exe-

cuted the fifth day of July, 1864, in accordance with an act of the Legislature of the State of Michigan entitled "An act to provide for the formation of companies to construct canals or harbors and improve the same," approved March 13, 1861, has become entitled to valuable franchises, rights of way, lands, and property, including the right to locate, establish, construct, and use, and to enforce tolls for the use of the same, a certain ship canal from Portage Lake to Lake Superior through the neck of land called the "Portage;"

And whereas the State of Michigan did become entitled to certain other valuable franchises, rights of way, lands, and property, to wit, the right of locating and constructing a breakwater and harbor and ship canal through any public lands at or upon the neck of land on Lake Superior known as the "Portage;" and whereas the State of Michigan, for the purpose of locating and constructing said canal and harbor, became entitled to one thousand feet of land on the shores of Lake Superior and four hundred feet of land on the shores of Portage Lake on said neck of land called the "Portage;" and whereas the Congress of the United States of America, in the
43 same act by which the aforesaid rights, franchises, and privileges were granted to and conferred upon the said State of Michigan, did, by said act entitled "An act granting land to the State of Michigan to aid in building a harbor and ship canal at Portage Lake, Kewenaw Point, Lake Superior," approved March 3, 1865, grant to said State, for the purpose of aiding said State in constructing and completing a harbor and ship canal to connect the waters of Lake Superior with the waters of Portage Lake, two hundred thousand acres of public land, to be selected from and land in the upper peninsula of said State subject to private entry;

And whereas the State of Michigan, by an act of the Legislature of said State entitled "An act to accept a grant of land by act of Congress to aid in the construction of the ship canal at the head of Portage Lake with Lake Superior, and to provide for the construction of the same," approved March 18, 1865, did accept said grant of land, together with all the rights, powers, privileges, and franchises, by said act of Congress granted said State, and did grant said lands to and confer the same, together with all other the rights, franchises, and privileges, upon the said Portage Lake and Lake Superior Ship Canal Company;

And whereas the said State of Michigan, by virtue of the said act aforesaid, approved March 18, 1865, did, in addition thereto, for the purpose of aiding said Portage Lake and Lake Superior Ship Canal Company to construct and complete said ship canal, authorize and empower said Portage Lake and Lake Superior Ship Canal Company to hypothecate and mortgage said lands, franchises, and privileges and rights of way; and whereas the party of the first part, by virtue of said acts and by virtue of the act of incorporation, is, among other things, expressly empowered to borrow money and issue bonds or other evidences of debt to secure the same, and to mortgage, pledge, or otherwise dispose of all its right, title, claim, or demand of, in, or to any lands granted to said com-
44 pany, and in any other estate, real, personal or mixed, of

which it may be seized at the time of the execution of such mortgage or which it may acquire subsequent thereto, in such manner and on such terms as the directors may think proper;

And whereas the party of the first part, for the purpose of constructing and completing the said harbor and ship canal, did, on the first day of July, 1865, by indenture of mortgage dated on that day, mortgage the said harbor and ship canal and its equipments, appendages, rights, franchises, tolls, and income, and also the said two hundred thousand acres of land as aforesaid granted to said ship canal company by said act of Congress and said act of the Legislature of the State of Michigan to Columbus C. Douglass, of the city of New York, as trustee, to secure the payment of the principal sum of five hundred thousand dollars and the interest that might from time to time accrue thereon to the holders of the bonds of said company, as in and by said deed of trust or indenture of mortgage was particularly specified, and did simultaneously with said deed of trust execute, issue, negotiate, and sell one thousand bonds of five hundred dollars each and numbered from one to one thousand, each of which said bonds were of even date with said deed of trust, and provided for the payment of the principal on the first day of July, 1875, at the Ocean Bank, in the city of New York; and for the interest on said principal, at the rate of ten per cent. per annum, semi-annually, on the first days of January and July in each year, at the Ocean Bank, in the city of New York, on presentation and surrender of the interest warrants or coupons to be annexed to such bonds, which bonds were duly executed under the seal of the company and by the president and secretary thereof, and the said coupons authenticated by the signature or initials of said secretary, and each of which bonds were also certified by the said trustee in said deed of trust to be one of the bonds secured by said deed; and whereas said bonds, amounting to the sum of five hundred thousand dollars, have been issued by said company — are now an outstanding and subsisting lien upon the said ship canal, its appendages and appurtenances, and upon the two hundred thousand acres of land embraced in and granted to said party of the first part by said act of the Congress of the United States of America and said act of the Legislature of the State of Michigan approved March 3, 1865;

And whereas the Congress of the United States of America, by an act approved July 3, 1866, entitled "An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Kewenaw Point, Lake Superior, in said State," granted, in addition to a former grant for that purpose by act approved March 3, 1865, to the State of Michigan, to the use and for the benefit of the Portage Lake and Lake Superior Ship Canal Company, the parties of the first part, in accordance with the act of the Legislature of that State passed March 18, 1865, conferring the lands granted to said State by said former act upon said company, two hundred thousand acres of land in the upper peninsula of the State of Michigan;

And whereas the party of the first part has become and is en-

titled to the said two hundred thousand acres of land in the said act of July 3d, 1866, mentioned and described, and is, by the said act of July 3, 1866, and by the said act of the Legislature of the State of Michigan, referred to in and made a part of said act of Congress of July 3, 1866, expressly authorized and empowered to hypothecate or mortgage said lands granted by said act for the purpose of constructing and building said harbor and ship canal:

And whereas the party of the first part, for the purpose of constructing said harbor and ship canal and for the purpose of completing the same, has determined to obtain a further or second loan to the amount of five hundred thousand dollars. At a meeting of the board of directors of said company, held at the office of said company, in the city of New York, on the 27th day of June,
46 1866, it was resolved that the officers of said company be, and by said resolution they were, authorized, empowered, and requested to procure, obtain, and make a second loan, to the amount of five hundred thousand dollars, upon the terms and security herein mentioned, and for that purpose to issue its bonds to said amount of five hundred thousand dollars, secured by mortgage of said ship canal and its equipments, appendages, rights, franchises, tolls, and income, and upon the said two hundred thousand acres of land granted to the party of the first part by said act of Congress of the United States approved July 3, 1866, and to sell and dispose of the same—that is to say, 1,000 bonds of five hundred dollars each, and numbered from 1 to 1,000; each of said bonds to be of even date herewith, and to provide for payment of the principal on the first day of July, 1878, at the Ocean Bank, in the city of New York, and for the payment of interest on said principal at the rate of ten per cent. per annum, semi-annually, on the first days of January and July in each year, at the Ocean Bank, in the city of New York, on presentation and surrender of the interest warrants or coupons to be annexed to said bonds, which bonds shall be duly executed under the seal of the company and by the president and secretary thereof, and the said coupons authenticated by the signature or initials of said secretary; and each of said bonds shall also be certified by the party of the second part to be one of the bonds secured by this indenture:

Now, therefore, this indenture witnesseth: That the party of the first part, to secure the payment of the said bonds or obligations and the interest thereon and the performance of the covenants on its part hereinafter contained, and in consideration of the premises and of one dollar to it in hand paid by the party of the second part at the time of the execution hereof, the receipt of which sum is hereby acknowledged, hath granted, bargained, sold, assigned, set over or released, conveyed, and confirmed, and hereby doth grant, bargain, sell, assign, set over or release, convey, and confirm, unto the said party
47 of the second part all and singular the canal aforesaid, constructed or to be constructed, with all the rights and franchises growing out of or appertaining to said canal, together with the income, profits, or tolls to be collected, received, or enjoyed by the said party

of the first part or in anywise belonging to said party of the first part for the use of said canal, and also all the lands and hereditaments acquired, appropriated to, or in anywise belonging to said party of the first part, and all and singular the vessels, tugs, dredges, and equipments of said party of the first part which are now or shall hereafter be owned or acquired by the party of the first part, and also all other goods and chattels now owned or which shall hereafter be owned by the party of the first part in any way relating to or appertaining to or connected with said canal or the using or operating the same, together with all rents, incomes, issues, profits, moneys, rights, benefits, and advantages derived or which in any way may be derived from the premises, subject, however, to the conditions of the said mortgage of five hundred thousand dollars, executed on the said first day of July, 1865, and to the payment of the bonds thereby intended to be secured, according to the tenor and import thereof, the said mortgage being a first lien or security upon the above-described real and personal property and this indenture being a second mortgage upon the said property and the lien hereby created being subject thereto; and the said Portage Lake and Lake Superior Ship Canal Company, the party of the first part, further to secure the payment of the said bonds and obligations and the interest thereon and the performance of the covenants on its part hereinafter contained, and in consideration of the premises and of one dollar to it in hand paid by the party of the second part at the time of the execution hereof, the receipt of which sum is hereby acknowledged, hath granted, bargained, sold, assigned, set over or released, conveyed, and confirmed, and hereby doth grant, bargain, sell, assign, set over or release, convey, and confirm, unto the said party of the
48 second part all and singular two hundred thousand acres of land, being the same granted to the said party of the first part by act of Congress of the United States of America entitled "An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Kewenaw Point, Lake Superior, in said State," approved July 3d, 1866, together with all and singular the rights, privileges, and appurtenances to the said land belonging or in anywise appertaining, and all the rights and privileges *confirmed* by said act of Congress upon the said party of the first part the said last-mentioned two hundred acres of land being free and clear from incumbrance and this deed of trust being a first mortgage and creating a first lien thereupon: To have and to hold all and singular the premises, rights, franchises, property, real and personal, aforesaid, with the appurtenances, unto the said party of the second part and the successors of them, in trust, however, for the person or persons, firm or firms, and bodies politic or corporate, who have heretofore or shall hereafter at any time become and be, from time to time, the purchasers or holders or owners of the said bonds or any or either of them, subject, however, to the possession and management of said canal and property, including rents, incomes, issues, and profits aforesaid, by said party of the first part, its successors or assigns, so long as no default can be made in the payment of either principal or interest

of the bonds or any of them and so long as said party of the first part shall well and truly observe, keep, and perform all and singular the covenants and conditions in said bonds and in this indenture expressed to be observed, kept, and performed by or on behalf of said party of the first part; but nothing herein contained shall be construed to prevent the party of the first part from selling, hypothecating, or otherwise disposing of any bonds, mortgages, or other securities which may be received in payment for stock or by way of loan to said company nor from collecting moneys due the party of the first part on stock subscriptions or for any other ordinary indebtedness, provided in all such cases it shall proceed diligently to collect and faithfully apply all such means to the construction, equipment, or operating of said canal or the payment of any lien, debt, interest, or necessary expenses of or against the same, and provided, also, that no default shall have been made in the payment of the interest or principal of the said bonds or any of them.

The trusts, uses, and purposes upon which the premises, rights, franchises, and property, real and personal, aforesaid are conveyed to and are to be had, held, and disposed of by the party of the second part and the successors of them are as follows—that is to say: In case the party of the first part shall fail to pay the principal or any part thereof or any of the interest on any of the said bonds at any time when the same may become due and payable according to the tenor thereof, then, after sixty days from such default and upon the written request of the holders of any fifty of the said bonds, the party of the second part and the survivor and successors of them may —, and they are hereby, authorized and empowered to enter into and upon and to take actual possession of all and singular the aforesaid canal, premises, franchises, rights, and property, real and personal, and effects hereby granted, conveyed, assigned, mortgaged, pledged, transferred, and set over, or intended so to be, and, until sale thereof, by themselves or their agents or substitutes, to have, use, and employ the same and collect and receive the tolls, income, and profits, receipts, and earnings thereof and of every part thereof or to be derived therefrom, making from time to time, in their full discretion, all needful repairs, alterations, and additions thereto, and, after deducting the expenses of such use, repairs, alterations, their costs, charges, and expenses, to apply the receipts, tolls, income, earnings, and profits of the said canal and the appurtenances towards the payment of the interest and principal of all said bonds remaining unpaid; and in such case the agent or agents of said canal actually in possession thereof are hereby ordered to give possession to the party of the second part, the survivor and successors of them; and on such default and after such lapse of time thereafter as aforesaid the party of the second part, the survivor and successors of them, may and, upon the written request of the holders of at least one-twentieth in amount of the said bonds or of such of them as shall have been actually and in good faith negotiated and issued and shall then remain unpaid, shall —, and they hereby are, authorized and empowered to cause to be sold the said canal, prem-

ises, franchises, rights, and property, real and personal, of every character, or so much thereof as shall be necessary to pay and discharge the principal and interest of all such of the said bonds issued and negotiated as aforesaid as may then remain unpaid, at public auction, in accordance with the laws of the State of Michigan, and execute to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance in fee simple for the same, including all the franchises aforesaid, and which sale shall be a bar against the party of the first part and its successors and assigns and all persons claiming under it of all right, interest, or claim in or to the premises or any part thereof; and the party of the second part and the survivors and successors of them shall, after deducting from the proceeds of such sale the costs and expenses thereof and of the management of such property and his own costs and charges and expenses, apply the balance, so far as the same will go, to the payment of the principal and interest of those of the said bonds which shall then be unpaid, and return the residue thereof, if any, to the party of the first part, its successors or assigns: Provided, nevertheless, That if, in the judgment of said party of the second part, their survivors or successors, it will be more conducive to the interest and protection of the holders of said bonds to buy in the said mortgaged premises or any part thereof at such sale on behalf of the said bondholders and in trust for them, then it shall be lawful for the said party of the second part, their survivors or successors, as such trustees, to make such purchase for such purpose and in trust for said bondholders, unless the party of the first part or some other party or parties shall at such sale pay or offer and secure to be paid (to their satisfaction) the full amount then due or secured upon all the said bonds, with all reasonable costs, charges, and expenses then due or incurred in the premises or in or about the proceeding to effect such sale; and in case of such purchase by the party of the second part, their survivors or successors, they shall thereupon have and hold a full, absolute, and indefeasible title to all and singular the property and premises and franchises so purchased, but in trust, nevertheless, after payment of all just and legal charges, for the holders of the said bonds secured by the present indenture and then remaining unpaid and free from all other trusts and liens, but with full powers of management and control for the use of said bondholders until they or a majority of them shall have reorganized said company or shall have authorized a further public or private sale or disposition of the said property by the said trustees.

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And it is also provided that the said trustees or their survivor or successors may appoint or employ at the expense of the party of the first part all such attorneys, clerks, or other agents as they may deem necessary for the proper execution of the trusts and powers hereby created.

And it is further provided and agreed that it shall be lawful for the party of the first part to effect sales, from time to time, of any such lands; and the party of the second part, their survivor or successors, shall and will execute a release of the land so sold, discharg-

ing it from the lien of the present indenture, upon receiving or when they shall have received from the purchaser, either directly or through the party of the first part, the sum of five dollars per acre for the land so sold.

And it is further provided and agreed that it shall be lawful for the party of the first part, from time to time and at all times,
52 to cut, manufacture into lumber, market and sell, or cause to be cut, manufactured into lumber, marketed and sold, any of the standing timber upon the lands granted to the party of the first part by the said act of the Congress of the United States approved July 3d, 1866, and covered by this mortgage; but the said party of the first part shall, before cutting or causing to be cut any such standing timber upon such land, notify the said party of the second part or their survivors or successors of the intention and purpose of the said party of the first part to cut or cause to be cut said standing timber, which notice shall be in writing and shall contain a description of the lands upon which said party of the first part proposes to cut said standing timber, and said party of the first part shall, within six months after said notice, pay into the hands of the said party of the second part, their survivors or successors, for the benefit and to the credit of this trust and for the payment and redemption of the bonds or obligations herein and hereby secured, a sum equal to the sum of five dollars for every acre of land included in said notice and upon which the said party of the first part shall propose to cut or cause to be cut said standing timber; and the said party of the second part, their survivors or successors, shall apply all money so received by them to the redemption and cancellment of said bonds.

And it is further provided and declared that such portion of the proceeds of all the lands so sold and all moneys received for the cutting of timber as aforesaid shall constitute a sinking fund for the payment and redemption of the aforesaid mortgage bonds, and it shall be by the party of the second part and their survivors or successors faithfully applied to that object; and until such moneys shall be so applied the same shall be deposited upon the best terms which can be procured for the same to the credit of the party hereto of the second part, their survivor or successors; and whenever from time to time there shall be any money so on deposit said party of the second part, their survivors or successors, may, in their
53 discretion, apply the same to the purchase or redemption of so many of the aforesaid bonds as such moneys shall from time to time be adequate to redeem, but at rates not exceeding the par value of the said bonds, unless by consent of the board of directors, it being hereby made the duty of the said trustees to purchase or redeem the same upon such terms as will be most advantageous to the party of the first part.

And it is further provided and agreed by the said party of the first part that they will at all times receive the bonds hereby secured at par in payment for lands and standing timber purchased of the said party of the first part by any person or persons, body or bodies

corporate or politic, holding the same, whether the said bonds shall or shall not be matured at the time of making said purchases.

And it is further provided that it shall be lawful for the said party of the second part, their survivors or successors, and it shall be his or their duty so to do from time to time and at all times when requested thereto by the said party of the first part, to release to the said party of the first part from the operation and incumbrance of this mortgage any of the lands herein mortgaged, the same being part of the lands granted to the said party of the first part by said act of Congress of July 3, 1866, upon said party of the first part delivering up to the said party of the second part, their survivors or successors, to be canceled bonds hereby secured equal to the payment for said lands so to be released at the rate of five dollars per acre.

And the party of the first part doth hereby covenant and agree to and with the said party of the second part and their survivors and successors that the party of the first part will well and truly pay the said bonds and the interest due and to grow due thereon according to the true tenor thereof, and shall not and will not at any time take or in any manner use, interpose, or avail itself of any injunction or stay of proceedings, or any extension laws, stop laws, valuation laws, redemption laws, or any other laws of the said State
54 of Michigan now in force or which may hereafter be in force in said State, and which may in any way alter, impair, or change the rights and interests of the holders of said bonds or of the party of the second part as herein declared, or which shall in any way impede the mode or manner of realizing or enforcing the said rights and interests, or which shall affect or alter the time, place, means, or manner of perfecting, enjoying, or enforcing any of such rights or interests as the same are herein declared, and nothing herein contained shall prevent the party of the second part, the survivors and successors of them, immediately upon default in the payment of the principal or interest of any of the said bonds, from adopting any other legal or equitable remedies not herein specified for foreclosing this mortgage or collecting the amounts which may be due on such bonds.

And that the party of the first part shall and will pay or cause to be paid all taxes, charges, and assessments imposed or assessed, or which may hereafter be imposed or assessed, upon the said premises, lands, franchises, and property hereby mortgaged, and shall and will do at its own proper costs all things necessary or proper to be done in order to preserve or make effectual the lien and security hereby created or intended so to be.

And the party of the first part hereby covenants, for the consideration aforesaid, to execute and deliver to the party of the second part, their survivors and successors, any further reasonable and necessary conveyances or instruments for the said canal, premises, rights, franchises, and property, real and personal, or any part thereof for more fully carrying into effect the interests hereof, and particularly for the conveyance of any property subsequently to the date hereof acquired by the party of the first part and embraced or intended to be embraced in the description aforesaid; and, further, that at all times

until the said bonds shall be all fully paid, with the interest due and to grow due thereon, the party of the first part, its successors and assigns, will permit the party of the second part, the
55 survivors and successors of them, or their agents, clerks, or substitutes freely to inspect all the books of account, memoranda, or other books or reports of such party of the first part, its successors and assigns.

And these presents are upon the express condition that after the payment in full of all the said bonds which shall have been sold or otherwise disposed of and issued, with all the interest due and to grow due thereon, these presents and the estate hereby granted shall cease and be void, and the party of the first part shall be immediately and fully reinvested with the said premises hereby granted in law and in fact and without any entry or other act whatsoever, and that until default shall be made by the said party of the first part, either in the payment of the said bonds, any or either of them, or in payment of the said interest due and to grow due thereon as aforesaid, or in keeping and observing any of the covenants and agreements herein contained, the party of the first part, its successors and assigns, shall remain in quiet and peaceable possession and enjoyment of the said premises and property herein granted and conveyed.

And it is hereby further mutually covenanted by and between the parties hereto that the party of the second part and their successors shall only be accountable for reasonable diligence in the management of said trusts and shall not be responsible for the acts of any agents appointed by them honestly and in good faith nor for the act of each other, and, so far as moneys or other property shall be received by them, shall only be responsible for such sums of money or property as shall have come into their hands or under their control, and they shall be entitled to receive and may deduct from any moneys in their hands by reason hereof at any time all their costs, charges, and expenses and proper compensation for every labor or service performed by them in the execution of the trusts hereby created.

And it is further provided that the said party of the second
56 part or their successors may at any time, by an instrument under their hands and seals and which may be recorded where this instrument shall be recorded, resign the trusts hereby created, and that in case of the death, resignation, or inability of the party of the second part or their successors to act in the execution of any of the trusts aforesaid, then it shall be lawful for any judge of the supreme court of the States of New York or Michigan to select and appoint, by an instrument under his hand and seal, which shall be recorded in the same office or offices where this instrument shall be recorded, one or more competent person or persons to fill the vacancy so created, and such person or persons so appointed trustee or trustees shall have and possess, either with or without further or other conveyance to him, and be vested with the same rights and powers as a trustee or trustees as he or they would have had and possessed or been vested with had he or they been originally made

a party or parties of the second part to this indenture and shall perform the same duties in all respects.

In witness whereof the said party of the first part has caused its president to subscribe and its secretary to attest this indenture and has caused its corporate seal to be hereto affixed, and the party hereto of the second part, for the purpose of signifying their acceptance of the trusts herein and hereby created, have hereto subscribed their names and affixed their seals on the day and year first above written.

[Seal of the Company.]

(Signed) P. J. AVERY, *President.*
H. S. WELLES, *Secretary.*

57 STATE OF NEW YORK, } ss:
City and County of New York, }

I, Frederick B. Swift, commissioner for the State of Michigan in New York, hereby certify that on this first day of September, A. D. one thousand eight hundred and sixty-eight, personally appeared before me Perez J. Avery and Henry S. Welles, to me known personally and also to be the same individuals who executed the foregoing instrument, and severally acknowledged the execution thereof; and the said Avery and Welles, being by me first duly sworn, severally deposed and said, the said Avery that he was at the date of said instrument and is the president of the Portage Lake and Lake Superior Ship Canal Company, and that he executed said instrument as such by virtue of and in obedience to a resolution of the board of directors of said company requiring the same, duly passed and entered in the minutes of the board, and that prior to the execution thereof the word "last" had been inserted on the third page and nineteenth line of said instrument; and the said Welles that he was and is the duly appointed and qualified secretary of said company, and executed said instrument as such by virtue of said resolution, and that by virtue of the same he affixed the seal thereon impressed, which is the seal of said corporation: and that said D. Randolph Martin and Thomas T. Davis personally appeared before me, and they are personally known to me to be the persons who executed said deed as trustees, and they each acknowledged that they executed the same for the purposes therein mentioned, and that they accepted the trusts thereby and therein created, and that prior to the execution thereof by them the word "last" had been inserted on the third page and nineteenth line of said instrument.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year aforesaid.

(Signed) FREDERICK B. SWIFT,
Commissioner for Michigan
In and for the City and County of New York.

58 EXHIBIT C.

Portage Lake and Lake Superior Ship Canal Company.

Trust Deed.

An indenture made and entered into the first day of July, one thousand eight hundred and seventy, by and between the Portage Lake and Lake Superior Ship Canal Company, a corporation existing under the laws of the State of Michigan, party of the first part, and Charles L. Frost, of the city of New York, party of the second part.

Whereas the party of the first part, by act of incorporation executed the fifth day of July, 1864, in accordance with an act of the Legislature of the State of Michigan entitled "An act to provide for the formation of companies to construct canals or harbors and improve the same," approved March 13, 1861, has become entitled to valuable franchises, rights of way, lands, and property, including the right to locate, establish, construct, and use, and to enforce tolls for the use of the same, a certain ship canal from Portage Lake to Lake Superior, through the neck of land called the "Portage;"

And whereas the State of Michigan did become entitled to certain other valuable franchises, rights of way, lands, and property, to wit, the right of locating and constructing a breakwater and harbor and ship canal through any public lands at or upon the neck of land on Lake Superior known as the "Portage;" and whereas the State of Michigan, for the purpose of locating and constructing said canal and harbor, became entitled to one thousand feet of land on the shores of Lake Superior and four hundred feet of land on the shores of Portage Lake on said neck of land called the "Portage;" and whereas the Congress of the United States of America, in the same act by which the aforesaid rights, franchises, and privileges
59 were granted to and conferred upon the said State of Michigan, did, by said act entitled "An act granting land to the State of Michigan to aid in building a harbor and ship canal at Portage Lake, Kewenaw Point, Lake Superior," approved March 3, 1865, grant to said State, for the purpose of aiding said State in constructing and completing a harbor and ship canal to connect the waters of Lake Superior with the waters of Portage Lake, two hundred thousand acres of public land, to be selected from any lands in the upper peninsula of said State subject to private entry;

And whereas the State of Michigan, by an act of the Legislature of said State entitled "An act to accept a grant of land by act of Congress to aid in the construction of the ship canal at the head of Portage Lake with Lake Superior, and to provide for the construction of the same," approved March 18, 1865, did accept said grant of land, together with all the rights, powers, privileges, and franchises by said act of Congress granted said State, and did grant said lands to and confer the same, together with all other the rights, franchises, and privileges, upon the said Portage Lake and Lake Superior Ship Canal Company;

And whereas the said State of Michigan, by virtue of the said act aforesaid, approved March 18, 1865, did, in addition thereto, for the purpose of aiding said Portage Lake and Lake Superior Ship Canal Company to construct and complete said ship canal, authorize and empower said Portage Lake and Lake Superior Ship Canal Company to hypothecate and mortgage said lands, franchises, privileges, and rights of way; and whereas the party of the first part, by virtue of said acts and by virtue of the act of incorporation, is, among other things, expressly empowered to borrow money and issue bonds or other evidences of debt to secure the same, and to mortgage, pledge, or otherwise dispose of all its right, title, claim or demand of, in, or to any lands granted to said company, and in any other estate, real, personal, or mixed, of which it may be seized at the time of the execution of such mortgage or which it may aquire
60 subsequent thereto, in such manner and on such terms as the directors may think proper;

And whereas the party of the first part, for the purpose of constructing and completing the said harbor and ship canal, did, on the first day of July, 1865, by indenture of mortgage dated upon that day, mortgage the said harbor and ship canal and its equipments, appendages, rights, franchises, tolls and income, and also the said two hundred thousand acres of land as aforesaid granted to said ship canal company by said act of Congress and said act of the Legislature of the State of Michigan to Columbus C. Douglass, of the city of New York, as trustee, to secure the payment of the principal sum of five hundred thousand dollars and the interest that might from time to time acrue thereon to the holders of the bonds of said company, as in and by said deed of trust or indenture of mortgage was particularly specified, and did simultaneously with said deed of trust, execute, issue, negotiate, and sell one thousand bonds of five hundred dollars each and numbered from 1 to 1,000, each of which said bonds were of even date with said deed of trust and provided for the payment of the principal on the first day of July, 1875, at the Ocean Bank, in the city of New York, and for the interest on said principal, at the rate of ten per cent. per annum, semi-annually, on the first days of January and July in each year, at said Ocean Bank, in the city of New York, on presentation and surrender of the interest warrants or coupons to be annexed to such bonds, which bonds were duly executed under the seal of the company and by the president and secretary thereof, and the said coupons authenticated by the signature or initials of said secretary, and each of which bonds were also certified by the said trustee in the deed of trust named to be one of the bonds secured by said deed; and whereas said bonds, amounting to the sum of five hundred thousand dollars, have been issued by said company and are now an outstanding and subsisting lien upon the said ship canal,
61 its appendages and appurtenances, and upon the two hundred thousand acres of land embraced in and granted to said party of the first part by said act of the Congress of the United States of America approved March 3, 1865, and by said act of the Legislature of the State of Michigan approved March 18, 1865;

And whereas the Congress of the United States of America, by an act approved July 3, 1866, entitled "An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Kewenaw Point, Lake Superior, in said State," granted, in addition to a former grant for that purpose, by act approved March 3, 1865, to the State of Michigan, to the use and for the benefit of the Portage Lake and Lake Superior Ship Canal Company, the parties of the first part, in accordance with the act of the Legislature of that State, passed March 18, 1865, conferring the lands granted to said State by said former act upon said company, two hundred thousand acres of land in the upper peninsula of the State of Michigan:

And whereas the party of the first part has become and is entitled to the said two hundred thousand acres of land in the said act of July 3, 1866, mentioned and described, and is by the said act of July 3, 1866, and by the said act of the Legislature of the State of Michigan referred to in and made part of said act of Congress of July 3, 1866, expressly authorized and empowered to hypothecate or mortgage said lands granted by said act for the purpose of constructing and building said harbor and ship canal;

And whereas the party of the first part, for the purpose of constructing and completing the said harbor and ship canal, did, on the first day of July, 1868, by indenture of mortgage dated on that day, mortgage the said harbor and ship canal and its equipments, appendages, rights, franchises, tolls, and income, and also the said two hundred thousand acres of land as aforesaid granted to the State of Michigan for the use and benefit of the said ship canal by act of Congress passed the third day of July, 1866, to D.
62 Randolph Martin and Thomas T. Davis, as trustees, to secure the payment of the principal sum of five hundred thousand dollars and the interest that might from time to time accrue thereon to the holders of the bonds of said company, as in and by said deed of trust or indenture of mortgage was particularly specified, and did, simultaneously with said deed of trust, execute, issue, negotiate, and sell one thousand bonds of five hundred dollars each and numbered from 1 to 1000, each of which said bonds were of even date with said deed of trust and provided for the payment of the principal on the first day of July, 1878, at the Ocean Bank, in the city of New York, and for the interest on said principal, at the rate of ten per cent. per annum, semi-annually, on the first days of January and July in each year, at said Ocean Bank, in the city of New York, on presentation and surrender of the interest warrants or coupons to be annexed to such bonds, which bonds were duly executed under the seal of the company and by the president and secretary thereof, and the said coupons authenticated by the signature or initials of said secretary, and each of which bonds were also certified by the said trustees in the deed of trust named to be one of the bonds secured by said deed; and whereas said bonds, amounting to the sum of five hundred thousand dollars, have been issued by said company and are now an outstanding and subsisting lien upon the said ship canal, its appendages and appurtenances, and

upon the two hundred thousand acres of land embraced in and granted to said party of the first part by said act of Congress of the United States of America approved July 3, 1866;

And whereas it was, among other things, provided and agreed in and by said deed that it should be lawful for the party of the first part to effect sales from time to time of any such lands, and the said Martin and Davis, their survivors and successors, should and would execute a release of the land so sold, discharging it from the lien of that indenture, upon receiving or when they should have
63 received from the purchaser (either directly or through the party of the first part) the sum of five dollars per acre for the land so sold;

And it was further provided and agreed in and by said deed of trust that it should be lawful for the party of the first part, from time to time and at all times, to cut, manufacture into lumber, market, and sell, or to cause to be cut, manufactured into lumber, marketed, and sold, any of the standing timber upon the lands granted to the party of the first part by the said act of the Congress of the United States approved July 3, 1866, and covered by that mortgage, but the said party of the first part should, before cutting or causing to be cut any such standing timber upon such land, notify the said Martin and Davis or their survivors or successors of the intention and purpose of the said party of the first part to cut or cause to be cut said standing timber, which notice should be in writing, and should contain a description of the lands upon which said party of the first part proposed to cut said standing timber, and said party of the first part should within six months after said notice pay into the hands of the said Martin and Davis, their survivors or successors, for the benefit and to the credit of that trust, and for the payment and redemption of the bonds or obligations therein and thereby secured, a sum equal to the sum of five dollars for every acre of land included in said notice, and upon which the said party of the first part should propose to cut or cause to be cut said standing timber, and the said Martin and Davis, their survivors or successors, should apply all money so received by them to the redemption and cancelment of said bonds;

And it was further provided and declared in and by said deed of trust that such portion of the proceeds of all the lands so sold, and all moneys received for the cutting of timber as aforesaid, should constitute a sinking fund for the payment and redemption of the said mortgage bonds, and it should be by the party of the second part and their survivors or successors faithfully applied to that object, and until such moneys should be applied the same should
64 be deposited upon the best terms which could be procured for the same to the credit of Martin and Davis, their survivors or successors; and whenever, from time to time, there should be any money so on deposit said Martin and Davis, their survivors or successors, might, in their discretion, apply the same to the purchase or redemption of so many of the said bonds as such moneys should from time to time be adequate to redeem, but at rates not exceeding the par value of the said bonds, unless by consent of the board

of directors of said company, it being thereby made the duty of the said trustees to purchase or redeem the same upon such terms as would be most advantageous to the party of the first part;

And it was further provided and agreed in and by said deed of trust by the said party of the first part that they would at all times receive the bonds thereby secured at par in payment for lands and standing timber purchased of the said party of the first part by any person or persons, body or bodies corporate and politic, holding the same, whether the said bonds should or should not be matured at the time of making said purchases;

And it is further provided in and by said deed that it should be lawful for the said Martin and Davis, their survivors or successors, and it should be his or their duty so to do from time to time and at all times when requested thereto by the said party of the first part, to release to the said party of the first part from the operation and incumbrance of that mortgage any of the lands thereby mortgaged, the same being part of the lands granted to the said party of the first part by said act of Congress of July 3, 1866, upon said party of the first part delivering up to the said Martin and Davis, their survivors or successors, to be cancelled, bonds thereby secured equal to the payment for said lands so to be released at the rate of five dollars per acre;

And whereas, also, the said bonds secured by the said two deeds of trust have all been negotiated and used by the said party of
65 the first part and the proceeds of the same have been expended upon said canal and breakwater;

And whereas, also, the said party of the first part, for the purpose of constructing said harbor and ship canal and for the purpose of completing the same, has determined to obtain a further or second loan to the amount of one million two hundred and fifty thousand dollars, and at a meeting of the board of directors of said company, held at the office of said company, in the city of New York, on the — day of June, 1870, it was—

Resolved, That the president, treasurer, and secretary be, and they are hereby, authorized, empowered, and requested to execute in due form a deed of trust or mortgage in the name of this company and under its seal to Charles L. Frost, as trustee, to secure an issue of twelve hundred and fifty bonds or notes, of the denomination of one thousand dollars each, and numbered from 1 to 1250, consecutively and inclusive, said deed of trust or mortgage to cover and convey all this company's canal in Michigan, and the franchises of this company, and all the four hundred thousand acres of land granted by acts of Congress of the United States of 3d March, A. D. 1865, and 3d July, A. D. 1866, and all the tools, implements, machinery, ships, steamers, scows, dredges, locomotives, and cars of this company, subject only to the lien of two deeds of trust, one made to C. C. Douglass, as trustee, and the other to D. Randolph Martin and Thomas T. Davis, as trustees, each deed last above referred to, for the sum of five hundred thousand dollars; and said president, treasurer, and secretary are hereby instructed and empowered to insert in said deed of trust to Charles L. Frost such clauses as will convey

to said Frost in trust for the holder or holders of said notes or bonds all the rights, benefits, and equities of redemption of this company under said deeds to Douglass and to Martin and Davis above referred to; and said officers, the president, treasurer, and secretary, are hereby authorized, empowered, and requested to execute in the name
66 of this company twelve hundred and fifty bonds or notes, as they may deem judicious, of the denomination of one thousand dollars each, and to bear such semi-annual interest—not more than 10 per centum per annum—and be payable on such time—not less than one year from 1st July, 1870—as in the opinion of the president and treasurer will be best to facilitate their negotiation and the raising of sufficient money to complete the canal; and they are further authorized, empowered, and requested to affix this company's seal to said deed of trust as evidence of its due execution and to use the seal of this company upon said bonds or notes to be executed by them if they may think proper, hereby declaring said notes or bonds valid and binding upon this company when executed and issued by the president and treasurer, whether the same shall be under seal or not;

And whereas the said president and treasurer, under and in pursuance of the above resolution, have and do deem it judicious to issue bonds instead of notes and have adopted the following as the form of said bond, viz:

No. —. UNITED STATES OF AMERICA. No. —.

Second-Mortgage Land-Grant Bond.

STATE OF MICHIGAN.

Know all men by these presents that the Portage Lake and Lake Superior Ship Canal Company hereby acknowledges itself to be indebted to Charles L. Frost, of the city of New York, in the sum of one thousand dollars, lawful money of the United States of America, for value received; which sum it promises to pay to Charles L. Frost, or bearer, at the Ocean National Bank, in the city of New York, on the first day of July, 1871, with interest thereon at the rate of seven per cent. per annum, payable semi-annually at the said bank on presentation and surrender of the annexed coupons or interest
67 warrants. This bond is one of a series of one thousand two hundred and fifty of like amount, tenor, and date, numbered from 1 to 1250, inclusive, and issued by the said company to aid in the construction and equipment of said ship canal from Portage Lake to Lake Superior, in the State of Michigan, as authorized by law. The payment of the principal and interest of said bond is secured by a conveyance, bearing even date herewith, made by said company unto Charles L. Frost, trustee, conveying to said trustee and his successors in trust its canal and four hundred thousand acres of mineral and pine-timbered lands, two hundred thousand of which were donated and granted by the Congress of the United States to the State of Michigan to aid in the construction of said canal by act approved March 3, 1865, and conferred upon said company by an act of the Legislature of said State of Michigan approved

March 18, 1865, and two hundred thousand acres donated and granted by the Congress of the United States, in accordance with the provisions of said last act, by act of Congress approved July 3, 1866, together with all property, real and personal, of said company, its rights, franchises, and tolls, and all its ships, steamers, dredges, railroad cars, dumping scows, and dumping cars; and it is further agreed that if the said company shall fail to pay the interest for thirty days after it shall become due the whole principal sum secured to be paid by this bond shall, at the option of the holder thereof, become due and payable at once, notwithstanding the time of payment above fixed; and it is further agreed that if the said company shall fail to pay the principal or any part thereof or the interest on any of the said bonds at any time when the same shall become due and payable, then, after thirty days from such default and upon the written request of the holders of one-twentieth in amount of the said bonds, or such of them as shall have actually and in good faith been negotiated and issued and shall then remain unpaid, the said trustee or his successor is authorized and required to convert said canal, equipments, tools, ships, steamers,
68 dredges, engines, dumping scows, and dumping cars and lands, franchises, and property into money and apply the same to the payment of said bonds and such interest as may then be outstanding, with power to buy in said property for the benefit of the bondholders.

In witness whereof the said company has caused this bond to be signed by its president and treasurer and attested by its secretary and its seal to be affixed this first day of July, A. D. 1870.

[SEAL.] —— ——, *President.*
—— ——, *Treasurer.*

—— ——, *Secretary.*

Now, therefore, this indenture witnesseth: That the party of the first part, to secure the payments of the said bonds or obligations and the interest thereon and the performance of the covenants on its part hereinafter contained, and in consideration of the premises and of one dollar to it in hand paid by the party of the second part at the time of the execution hereof, the receipt of which sum is hereby acknowledged, hath granted, bargained, sold, assigned, set over or released, conveyed, or confirmed, and hereby doth grant, bargain, sell, assign, set over or release, convey, and confirm, unto the said party of the second part all and singular the canal aforesaid, constructed or to be constructed, with all the rights and franchises growing out of or appertaining to said canal, together with the income, profits, or tolls to be collected, received, or enjoyed by the said party of the first part or in anywise belonging to said party of the first part for the use of said canal; and also all the lands and hereditaments acquired, appropriated to, or in anywise belonging to said party of the first part, and all and
69 singular the vessels, tugs, dredges, and equipments of said party of the first part which are now or shall hereafter be owned or acquired by the party of the first part; and also all other goods

and chattels now owned or which shall hereafter be owned by the party of the first part in any way relating to or appertaining to or connected with said canal or the using or operating the same, together with all rents, income, issues, profits, moneys, rights, benefits, and advantages derived or which in any way may be derived from the premises, subject, however, to the conditions of the said mortgage of five hundred thousand dollars executed on the said first day of July, 1865; and also the conditions of said mortgage or deed of trust executed on the first day of July, 1868, and to the payment of the bonds intended to be secured by both of said mortgages or deeds of trust, according to the tenor and import thereof, the said mortgage being prior liens or securities upon the above-described real and personal property, and this indenture being a second mortgage upon the said four hundred thousand acres of land and a third mortgage or lien upon said franchises and canal (both of said prior mortgages being liens upon said canal and franchises), and the lien hereby created being subject thereto; and the said Portage Lake and Lake Superior Ship Canal Company, the party of the first part, further to secure the payment of the said bonds and obligations and the interest thereon and the performance of the covenants on its part hereinafter contained, and in consideration of the premises and of one dollar to it in hand paid by the party of the second part at the time of the execution hereof, the receipt of which sum is hereby acknowledged, hath granted, bargained, sold, assigned, set over or released, conveyed, or confirmed, and hereby doth grant, bargain, sell, assign, set over or release, convey, and confirm, unto the said party of the second part all and singular four hundred thousand acres of land, being the same granted to the said party of the first part by two several acts of Congress, the first being by
70 an act entitled "An act granting lands to the State of Michigan to aid in building a harbor and ship canal at Portage Lake, Kewenaw Point, Lake Superior," approved March 3, 1865, and conferred upon this company by act of the Legislature of the State of Michigan of March 18, 1865, and the second by act of Congress of the United States of America entitled "An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Kewenaw Point, Lake Superior, in said State," approved July 3, 1866, together with all and singular the rights, privileges, and appurtenances to the said land belonging or in anywise appertaining, and all the rights and privileges conferred by said act of Congress upon the said party of the first part; to have and to hold all and singular the premises, rights, franchises, property, real and personal, aforesaid, with the appurtenances, unto the said party of the second part and his successor, in trust, however, for the person or persons, firm or firms, and bodies politic or corporate who have heretofore or shall hereafter at any time become and be, from time to time, the purchasers or holders or owners of the said bonds or any or either of them, subject, however, to the possession and management of said canal and property, including rents, incomes, issues, and profits aforesaid, by said party of the first part, its successors or assigns, so long as no default shall be made in

the payment of either principal or interest of the bonds or any of them and so long as said party of the first part shall well and truly observe, keep, and perform all and singular the covenants and conditions in said bonds and in this indenture expressed to be observed, kept, or performed by or on behalf of said party of the first part; but nothing herein contained shall be construed to prevent the party of the first part from selling, hypothecating, or otherwise disposing of any bonds, mortgages, or other securities which may be received in payment for stock or by way of loan to said company, nor from collecting moneys due the party of the first part on stock subscriptions or for any other ordinary indebtedness, pro-
71 vided in all such cases it shall proceed diligently to collect and faithfully to apply all such means to the construction, equipment, or operating of said canal or the payment of any lien, debt, interest, or necessary expenses of or against the same; and provided, also, that no default shall have been made in the payment of the interest or principal of the said bonds or any of them.

The trusts, uses, and purposes upon which the premises, rights, franchises, and property, real and personal, aforesaid are conveyed to and are to be had, held, and disposed of by the party of the second part and his successors are as follows—that is to say: In case the party of the first part shall fail to pay the principal or any part thereof or any of the interest on any of the said bonds at any time when the same may become due and payable according to the tenor thereof, then, after thirty days from such default and upon the written request of the holders of any fifty of the said bonds, the party of the second part or his successor may —, and they are hereby, authorized and empowered to enter into and upon and to take actual possession of all and singular the aforesaid canal, premises, franchises, rights, and property, real and personal, and effects hereby granted, conveyed, assigned, mortgaged, pledged, transferred, and set over or intended so to be, and (until sale thereof), by themselves or their agents or substitutes, to have, use, and employ the same and collect and receive the tolls, income, and profits, receipts, and earnings thereof and of every part thereof or to be derived therefrom, making, from time to time, in their full discretion, all needful repairs, alterations, and additions thereto, and, after deducting the expenses of such use, repairs, alterations, and their costs, charges, and expenses, to apply the receipts, tolls, income, earnings, and profits of the said canal and the appurtenances towards the payment of the interest and principal of all said bonds remaining unpaid; and in such case the agent or agents of said canal actually in possession thereof are hereby ordered to give possession to the party of
72 the second part or his successor, and on such default and after such lapse of time thereafter as aforesaid the party of the second part or his successor may and upon, the written request of the holders of at least one-twentieth in amount of the said bonds or of such of them as shall have been actually and in good faith negotiated and issued and shall then remain unpaid, shall —, and they hereby are, authorized and empowered to cause to be sold the said canal, premises, franchises, rights, and property, real and personal, of

every character, or so much thereof as shall be necessary to pay and discharge the principal and interest of all such of the said bonds issued and negotiated as aforesaid as may then remain unpaid, at public auction, in accordance with the laws of the State of Michigan, and execute to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance in fee simple for the same, including all the franchises aforesaid, and which sale shall be a bar against the party of the first part and its successors and assigns and all persons claiming under it of all right, interest, or claim in or to the premises or any part thereof; and the party of the second part or his successor shall, after deducting from the proceeds of such sale the costs and expenses thereof and of the management of said property and his own cost and charges and expenses, apply the balance, so far as the same will go, to the payment of the principal and interest of those of the said bonds which shall then be unpaid, and return the residue thereof (if any) to the party of the first part or assigns: Provided, nevertheless, That if, in the judgment of said party of the second part or his successor, it will be more conducive to the interest and protection of the holders of said bonds to buy in the said mortgaged premises or any part thereof at such sale on behalf of the said bondholders and in trust for them, then it shall be lawful for the said party of the second part or his successor, as such trustee, to make such purchase for such purpose and in trust for said bondholders, unless the party of the first part or some other party or parties shall at such sale pay or offer and secure to be paid (to his
73 satisfaction) the full amount then due or secured upon all the said bonds, with all reasonable costs, charges, and expenses then due or incurred in the premises or in or about the proceedings to effect such sale, and in case of such purchase by the party of the second part or his successor he shall thereupon have and hold a full, absolute, and indefeasible title to all and singular the property, premises, and franchises so purchased, but in trust, nevertheless (after payment of all just and legal charges), for the holders of the said bonds secured by the present indenture and then remaining unpaid and free from all other trusts and liens, but with full powers of management and control for the use of said bondholders until they or a majority of them shall have reorganized said company or shall have authorized a further public or private sale or disposition of the said property by the said trustee.

And it is also provided that the said trustee or his successor may appoint or employ, at the expense of the party of the first part, all such attorneys, clerks, or other agents as he may deem necessary for the proper execution of the trusts and powers hereby created; and the said party of the first part, for itself, its successors, and assigns, also covenants and agrees to and with the said party of the second part and his successor and with each and every holder of any one or more of the bonds hereby secured that under and by virtue of the clauses and provisions in the mortgage or deed of trust to D. Randolph Martin and Thomas T. Davis, trustees, hereinbefore referred to, relative to the releasing from the incumbrance thereof any of the lands of the grant of July 3, 1866, thereby mortgaged, the said party

of the second part or his successor in the office as trustee, or any holder of one or more of the bonds secured by this deed, may, at any and at all times, require the party of the first part to procure in the mode provided in said mortgage or deed of trust a release or releases from the incumbrance thereof of any of the lands mortgaged hereby; and that whenever the said party of the second part or his
74 successor as trustee, or any one of the holders of one or more of the bonds hereby secured, shall make such requirement in writing, specifying and describing the lands which may be so sought and desired to be released, and shall furnish and tender to said party of the first part, either in cash or in the bonds secured by the said mortgage or deed of trust to said D. Randolph Martin and Thomas T. Davis, a sum equivalent to the lands so specified at five dollars an acre, the said party of the first part shall pay or deliver the same to said D. Randolph Martin and Thomas T. Davis, trustees, or the survivor of them or his successors or successor, and procure such release therefrom of the lands so specified and desired to be released; and the party of the first part hereby constitutes and appoints the said Charles L. Frost, trustee, or his successor in this trust its true and lawful attorney, irrevocable, with power of substitution at any and all times, to do any and all necessary acts and things in the name of said party of the first part, or otherwise to procure a release or releases of any of said lands from said mortgage under the provisions and stipulations for that purpose therein contained; and it hereby authorizes and requests and directs said D. Randolph Martin and Thomas T. Davis, trustees, or the trustee or trustees of said mortgage for the time being to make, execute, and deliver to all and any of the holders of the bonds herein secured, at any and all times, such release or releases of any of the lands described and included in said mortgage from the incumbrance thereof as may be desired and required to be released by said holders of said bonds hereby secured on receiving from him or them in cash or in the bonds secured by said mortgage a sum equivalent to the lands sought to be released at five dollars an acre; and the party of the first part further covenants that the sum or sums which in cash or bonds may be, in any manner as above prescribed, used and appropriated by the said party of the second part or by the holder or holders of any of the bonds hereby secured in procuring such release or releases shall be
75 added to and deemed a part of the principal sum secured, to be paid by the said bonds held by the person or persons so using or appropriating the same, and the same shall become forthwith due and payable, and the party of the first part hereby agrees to pay the same: Provided, however, That the land or lands so released from the incumbrance of the said mortgage to D. Randolph Martin and Thomas T. Davis shall still, after such release, be owned by the said party of the first part, subject only to the incumbrance hereby created, to the amount of the bond or bonds hereby secured, owned by the person or persons procuring such release, with the amount of the money or bonds secured by the mortgage to said D. Randolph Martin and Thomas T. Davis, given for such release, added thereto.

And it is further covenanted by the party of the first part, its successors and assigns, that in case of the non-payment of the sums hereby intended to be secured or of any part thereof as herein agreed to be paid at the time or times limited for the payment thereof it shall and may be lawful for the said party of the second part or his successor, and the party of the first part does hereby authorize and empower the said party of the second part or his successor in office, to grant, bargain, and sell the said canal above described and hereby mortgaged, with the appurtenances and all the lands and real estate mortgaged or intended so to be herein and all the personal property, ships, tugs, steamboats, dredges, dumping scows, excavators or shovelers, railroad cars, and locomotives, and all tools and fixtures belonging to said canal, at public auction or vendue, and on such sale or sales to make and execute to the purchaser or purchasers all necessary deeds of conveyance pursuant to the statute in such case made and provided, and out of the money arising from such sale or sales to pay off and discharge all said bonds secured or intended to be secured hereby and the interest on the same and all moneys or the amount of all bonds secured by the mortgage
76 to D. Randolph Martin and Thomas T. Davis which may have been used by any bondholder or bondholders under this mortgage to procure the release of any lands from the operation of said mortgage to Martin and Davis and the costs and expenses of such vendue and sale, rendering the surplus money (if any there be) to the said party of the first part, its successors and assigns.

And it is further covenanted and agreed by the party of the first part that in case default shall at any time be made in the payment of the interest to grow due upon said bonds hereby secured from and after such default the whole principal of such bonds shall, at the option of the holder thereof, become due and payable.

And it is further provided and agreed by the said party of the first part that they will at all times receive the bonds hereby secured at par in payment for lands and standing timber purchased of the said party of the first part by any person or persons, body or bodies, corporate and politic, holding the same, whether the said bonds shall or shall not be matured at the time of making said purchases.

And the party of the first part doth hereby covenant and agree to and with the said party of the second part and his successor that the party of the first part will well and truly pay the said bonds and the interest due and to grow due thereon, according to the true tenor thereof, and shall not and will not at any time take or in any manner use, interpose, or avail itself of any injunction or stay of proceedings or any extension laws, stop laws, valuation laws, redemption laws, or any other laws of the State of Michigan now in force or which may hereinafter be in force in said State and which may in any way alter, affect, impair, or change the rights and interests of the holders of said bonds or of the party of the second part, as herein declared, or which shall in any way impede the mode or manner of realizing or enforcing the said rights and interests or

which shall affect or alter the time, place, means, or manner of perfecting, enjoying, or enforcing any of such rights or interests
77 as the same are herein declared; and nothing herein contained shall prevent the party of the second part or his survivor, immediately upon default in the payment of the principal or interest of any of the said bonds, from adopting any other legal or equitable remedies not herein specified for foreclosing this mortgage or collecting the amounts which may be due on such bonds.

And that the said party of the first part shall and will pay or cause to be paid all taxes, charges, and assessments imposed or assessed or which may hereafter be imposed or assessed upon the said premises, lands, franchises, and property hereby mortgaged, and shall and will do at its own proper costs all things necessary or proper to be done in order to preserve or make effectual the lien and security hereby created or intended so to be.

And the party of the first part hereby covenants, for the consideration aforesaid, to execute and deliver to the party of the second part or his successor any further reasonable and necessary conveyances or instruments for the said canal premises, rights, franchises, and property, real and personal, or any part thereof, for more fully carrying into effect the interests hereof, and particularly for the conveyance of any property subsequently to the date hereof acquired by the party of the first part and embraced or intended to be embraced in the description aforesaid; and, further, that at all times, until said bonds shall be all fully paid, with the interest due and to grow due thereon, the party of the first part, its successors and assigns, will permit the party of the second part or his survivor or their agents, clerks, or substitutes, freely to inspect all the books of account, memoranda, or other books or reports of such party of the first part, its successors and assigns.

And these presents are upon the express condition that after the payment in full of all the said bonds which shall have been sold or otherwise disposed of or issued, with all the interests due and to grow due thereon, these presents and the estate hereby granted
78 shall cease and be void, and the party of the first part shall be immediately and fully reinvested with the said premises hereby granted, in law and in fact, and without any entry or other act whatsoever; and that until default shall be made by the said party of the first part, either in the payment of the said bonds, any or either of them, or in payment of the said interests due or to grow due thereon as aforesaid, or in keeping and observing any of the covenants and agreements herein contained, the party of the first part, its successors and assigns, shall remain in quiet and peaceable possession and enjoyment of the said premises and property herein granted and conveyed.

And it is hereby further mutually covenanted by and between the parties hereto that the party of the second part and his successor shall only be accountable for reasonable diligence in the management of said trusts, and shall not be responsible for the acts of any agents appointed by him honestly and in good faith; and so far as moneys or other property shall be received by him, he shall only be

responsible for such sums of money or property as shall have come into his hands or under his control; and he shall be entitled to receive and may deduct from any moneys in his hands by reason hereof at any time all his costs, charges, and expenses and proper compensation for every labor or service performed by him in the execution of the trusts hereby created.

And it is further provided that the said party of the second part or his successor may at any time, by an instrument under his hand and seal and which may be recorded where this instrument shall be recorded, resign the trusts hereby created; and that in case of the death, resignation, or inability of the party of the second part or his successor to act in the execution of any of the trusts aforesaid, then it shall be lawful for any judge of the supreme court of the States of New York or Michigan to select and appoint, by an instrument under his hand and seal (which shall be recorded in the same office or offices where this instrument shall be recorded), one or
79 more competent person or persons to fill the vacancy so created; and such person or persons so appointed trustee or trustees shall have and possess, either with or without further or other conveyance to him or them, and be vested with the same rights and powers as a trustee or trustees as he or they would have had and possessed or been vested with had he or they been originally made a party or parties of the second part to this indenture and shall perform the same duties in all respects.

In witness whereof the said party of the first part has caused its president and treasurer to subscribe and its secretary to attest this indenture, and has caused its corporate seal to be hereto affixed, and the party hereto of the second part, for the purpose of signifying his acceptance of the trusts herein and hereby created, has hereto subscribed his name and affixed his seal on the day and year first above written.

Exhibit D.

Release.

Lucien Birdseye, as trustee, &c., to Jonathan Tremaine Wells.

This indenture, made this eleventh day of August, in the year of our Lord one thousand eight hundred and seventy-three, by and between Lucien Birdseye, of the city of Brooklyn, in the county of Kings and State of New York, acting as such trustee as hereinafter more particularly stated and set forth, party of the first part, and Jonathan Tremaine Wells, of the city of Brooklyn aforesaid,
80 party of the second part, witnesseth:

That whereas the Portage Lake and Lake Superior Ship Canal Company, which was a corporation duly and legally created and existing under and by virtue of the laws of the State of Michigan, did heretofore and on or about the 1st day of July, A. D. 1868, execute and deliver to Messrs. D. Randolph Martin, of the city of New York, and Thomas T. Davis, of the city of Syracuse, as trustees, a deed of trust bearing date on said first day of July, A.

D. 1868, wherein and whereby the said The Portage Lake and Lake Superior Ship Canal Company, after certain recitals in the said deed of trust particularly stated and set forth, did grant, bargain, sell, assign, set over, release, convey, and confirm unto them, the said Martin and Davis, among other things, all and singular two hundred thousand acres of land, being the same which the Congress of the United States of America, by an act approved July 3, 1866, entitled "An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Kewenaw Point, Lake Superior, in said State, granted in addition to a prior grant for that purpose, approved March 3, 1865, and which said grant was, by the terms of said act of Congress of July 3, 1866, to inure to the use and benefit of the said corporation, The Portage Lake and Lake Superior Ship Canal Company, the said lands and premises in said deed of trust mentioned and described being so as aforesaid granted to them, the said Martin and Davis, in trust to secure the payment of the principal and interest of a series of one thousand bonds, each of the amount or denomination of five hundred dollars, together with the interest thereon according to the terms of said several bonds and the said deed of trust, which said deed of trust was, after being duly acknowledged, recorded in the office of the register of deeds for the counties — Marquette, Chippewa, Ontonagon, and other counties in said State of Michigan, the particular terms, contents, provisions, and trusts of which said trust deed will more fully and at large appear by reference to the
81 said original trust deed or to such record or records thereof which are herein and hereby referred to and made a part of this instrument in the same manner as if the same were herein at length recited and set forth.

And whereas also it was in and by the said deed of trust particularly provided in the words following—that is to say: "And it is further provided that it shall be lawful for the said party of the second part, their survivor or successors, and it shall be his or their duty so to do from time to time and at all times when requested thereto by the said party of the first part, to release to the said party of the first part from the operation and incumbrance of this mortgage any of the land hereby mortgaged, the same being part of the lands granted to the said party of the first part by said act of Congress of July 3, 1866, upon said party of the first part delivering up to the said party of the second part, their survivors or successors, to be cancelled bonds hereby secured equal to the payment for said bonds so to be released at the rate of five dollars per acre;"

And it was in and by the last paragraph of the said deed of trust further particularly provided in the words following—that is to say: "And it is further provided that the said party of the second part or their successors may at any time, by an instrument under their hands and seals, and which may be recorded where this instrument shall be recorded, resign the trust hereby created, and that in case of the death, resignation, or inability of the party of the second part or their successors to act in the execution of any of the trust aforesaid, then it shall be lawful for any judge of the supreme court of

the States of New York or Michigan to select and appoint, by an instrument under his hand and seal (which shall be recorded in the same office or offices where this instrument shall be recorded), one on more competent person or persons to fill the vacancy so created, and such person or persons so appointed trustee or trustees
82 shall have and possess, either with or without further or other conveyance to him or them, and be vested with the same rights and powers as a trustee or trustees as he or they would have had and possessed or been vested with had he or they been originally made a party or parties of the second part to this indenture, and shall perform the same duties in all respects;"

And whereas also the said D. Randolph Martin and Thomas T. Davis, the said trustees under the said deed of trust, did, by their certain instrument of writing under their hands and seals, and which bore date on or about the thirteenth day of December, A. D. 1870, and which has since been recorded where said deed of trust was recorded, resign their said trusteeship and the said trusts, rights, interests, powers, and authorities granted to and conferred upon them and each of them in and by the said indenture or trust deed and all other the uses, trust, confidences, powers, authorities, rights, or interests whatsoever vested in them or either of them in reference to the premises and property, real and personal, rights, interests, and franchises in the said indenture or the trust deed specified or mentioned or set forth, and did also further resign, grant, bargain, sell, assign, transfer, set and deliver over, release, convey, and confirm to such person or persons as might be appointed the successor or successors of them or either of them under the said indenture or trust deed, or in the said trust or trusteeship in the said indenture or trust deed created and set forth, all and singular the powers, confidences, uses, trusts, authorities, rights, interests, privileges, duties, premises, property, real or personal, franchises, benefits, and advantages whatsoever vested in them or either of them, or conferred upon them or either of them, or granted or conveyed, transferred, assigned, or set over to them or either of them under or by virtue of the said indenture or trust deed, as by reference to the said resignation or the said record thereof will more fully and at large
83 appear, and to which reference is hereby made in the same manner as if the same were herein set forth at full length;

And whereas also afterwards and on or about the thirtieth day of December, A. D. 1870, upon petition of the said corporation, The Portage Lake and Lake Superior Ship Canal Company, the Honorable Daniel P. Ingraham, then being one of the judges of the said supreme court of the State of New York, by his certain instrument of writing or appointment, bearing date on the day last mentioned, and in pursuance of the power conferred by the said last paragraph of the said deed of trust hereinbefore recited, did nominate, constitute, select, and appoint the said Lucien Birdseye, the party of the first part hereunto, to fill the said vacancy so created by such resignation of the said D. Randolph Martin and Thomas T. Davis of their said trusts and trusteeship created and conferred upon them in and by the said indenture or trust deed of July 1, 1868, and did order,

direct, and appoint that the said Lucien Birdseye, so appointed such trustee, should have and possess and be vested with the same rights and powers as a trustee as he would have had, possessed, or been vested with had he been originally made and named as a party of the second part of, in, and to the said indenture or trust deed and should perform the same duties in all respects, which said appointment was afterwards recorded in the same offices in which the said indenture or trust deed was so as aforesaid recorded, to which said appointment or the records thereof reference is hereby made in the same manner as if the same were herein set forth at full length;

And whereas also the said Lucien Birdseye thereupon became such trustee under the said appointment and entered upon and has continued to exercise and discharge the duties of trustee under said deed of trust, and is now such trustee clothed with all the rights, powers, and duties which in and by the said deed of trust were created and conferred upon them, the said D. Randolph Martin and Thomas T. Davis, by the terms thereof;

84 And whereas also the said corporation, The Portage Lake and Lake Superior Ship Canal Company, the said party of the first part in and to the said above-described indenture or trust deed, after the making thereof and after the issuing of the bonds therein and thereby mentioned, described, and secured, and on or before the first day of July, A. D. 1870, did make, execute, and deliver to one Charles L. Frost a certain other indenture or trust deed, bearing date on the day last mentioned, and which was intended to secure the payment of a series of twelve hundred and fifty of the bonds of the said corporation, each of the amount or denomination of one thousand dollars, together with interest thereon, which said last-mentioned deed of trust was a second mortgage or second lien upon the lands so as aforesaid granted to said corporation by the said act of the Congress of the United States approved July 3, 1866, and so as aforesaid described in and covered by the said indenture or trust deed so as aforesaid given to the said D. Randolph Martin and Thomas T. Davis, hereinbefore set forth, as well as a third or subsequent lien of and upon all that certain other two hundred thousand acres of land theretofore granted by the Congress of the United States to the State of Michigan by the act entitled "An act granting lands to the State of Michigan to aid in building a harbor and ship canal at Portage Lake, Kewenaw Point, Lake Superior," approved March 3, 1865, which said last-mentioned deed of trust so given to the said Charles L. Frost was also recorded in the offices of the registers of deeds for the counties of Marquette, Chippewa, Menominee, and other counties of the State of Michigan, all of which will more fully and at large appear by reference to the said last-mentioned indenture or trust deed or the said records thereof, which are herein and hereby referred to and made a part of this instrument in the same manner as if the same were herein at length recited and set forth; and whereas also the said corporation, The Portage Lake and Lake Superior Ship Canal Company, at the time

85 of such execution and delivery of the said last-mentioned indenture or trust deed to the said Charles L. Frost, with the

view, interest, and purpose and for the sake of increasing and enhancing the value of the said bonds mentioned and described in and intended to be issued under and secured by the said indenture or trust deed to the said Charles L. Frost, and of promoting the speedy and advantageous sale of such bonds, and of conferring upon the holder or holders of any of such bonds mentioned and described in and intended to be secured by the said indenture or trust deed to the said Charles L. Frost the rights, powers, and privileges reserved to itself by the said corporation, The Portage Lake and Lake Superior Ship Canal Company, the party of the first part in and to the said indenture or trust deed so as aforesaid given to the said D. Randolph Martin and Thomas T. Davis to redeem any of the lands conveyed by the said indenture or trust deed to the said D. Randolph Martin and Thomas T. Davis from the operation and encumbrances thereof by delivering up to said trustees or their survivor or successors to be canceled bonds secured by said deed of trust or mortgage to said D. Randolph Martin and Thomas T. Davis equal to the payment for said lands so to be released at the rate of five dollars per acre, did covenant, promise, and agree in and by the said deed of trust to the said Charles L. Frost with each and every holder of any of the bonds therein mentioned and described and intended to be issued under and secured by such indenture or trust deed to said Charles L. Frost in the words following—that is to say: "And it is also provided that the said trustee or his successor may appoint or employ at the expense of the party of the first part all such attorneys, clerks, or other agents as he may deem necessary for the proper execution of the trust and powers hereby created; and the said party of the first part, for itself, its successors and assigns, also covenants and agrees to and with the said party of the second part and his
86 successor and with each and every holder of any one or more of the bonds hereby secured that under and by virtue of the clause and provisions in the mortgage or deed of trust to D. Randolph Martin and Thomas T. Davis, trustees, hereinbefore referred to, relative to the releasing from the incumbrances thereof any of the lands of the grant of July 3, 1866, thereby mortgaged, the said party of the second part or his successors in office, as trustee, or any holder of one or more of the bonds secured by this deed may at any and all times require the party of the first part to procure in the mode provided in said mortgage or trust a release or releases from the incumbrance thereof of any of the lands mortgaged hereby, and that whenever the said party of the second part or his successor, as trustee, or any one of the holders of one or more of the bonds hereby secured shall make such requirement in writing, specifying and describing the land which may be so sought and desired to be released, and shall furnish and tender to said party of the first part, either in cash or in bonds secured by the said mortgage a deed of trust to said D. Randolph Martin and Thomas T. Davis, a sum equivalent to the lands so specified at five dollars an acre, the said party of the first part shall pay or deliver the same to said D. Randolph Martin and Thomas T. Davis, trustees, or the survivors of them or their or his successor or successors, and procure such release therefrom of the lands

so specified and desired to be released; and the party of the first part hereby constitutes and appoints the said Charles L. Frost, trustee, or his successor in this trust its true and lawful attorney, irrevocable, with power of substitution at any and all times to do any and all necessary acts and things in the name of said party of the first part or otherwise to procure a release or releases of any of said lands from said mortgage under the provisions and stipulations for that purpose therein contained; and it hereby authorizes and requests and directs said D. Randolph Martin and Thomas T. Davis, trustees, or the trustee
87 or trustees of said mortgage for the time being to make, execute, and deliver to all and any of the holders of bonds herein secured at any and all times such release or releases of any of the lands described and included in said mortgage from the incumbrance thereof as may be desired and required to be released by said holders of said bonds hereby secured on receiving from him or them, in cash or in the bonds secured by said mortgage, a sum equivalent to the lands sought to be released at five dollars an acre; and the party of the first part further covenants that the sum or sums which in cash or bonds may be in any manner as above prescribed used and appropriated by the said party of the second part or by the holder or holders of any of the bonds hereby secured in procuring such release or releases shall be added to and deemed a part of the principal sum secured to be paid by the said bonds held by the person or persons so using or appropriating the same, and the same shall become forthwith due and payable; and the party of the first part hereby agrees to pay the same: Provided, however, That the land or lands so released from the incumbrance of the said mortgage to D. Randolph Martin and Thomas T. Davis shall still after such release be owned by the said party of the first part, subject only to the incumbrance hereby created to the amount of the bond or bonds hereby secured owned by the person or persons procuring such release, with the amount of the money or bonds secured by the mortgage to the said D. Randolph Martin and Thomas T. Davis given for such release added thereto," as by reference to the said indenture or trust deed to the said Charles C. Frost or the records thereof will more fully and at large appear, and which are herein and hereby referred to and made a part of this instrument in the same manner as if the same were herein at length recited and set forth; and whereas also the said Jonathan Tremaine Wells, the said party of the second part to this indenture, has pro-
88 duced and exhibited to the said party of the first part hereunto as such trustee as aforesaid forty (40) of the bonds so as aforesaid mentioned and described in and issued in pursuance of and intended to be secured in and by the said indenture or trust deed so given by said corporation to Charles L. Frost, each of the said bonds being for the principal sum of one thousand dollars of principal, besides interest, and the same being numbered, respectively, Nos. 541, 542, 543, 544, 545, 789, 790, 791, 792, 793, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 903, 904, 905, 906, 907, 908, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, of which said bonds he, the said Wells, is the holder, and has there-

upon, as such holder of the said bonds, claimed and demanded the benefit and advantage, rights and privileges, of the several provisions, covenants, and agreements contained in the said indenture or deed of trust to the said Charles L. Frost, hereinbefore stated and set forth, and has thereupon filed with the said party of the first part, as such trustee as aforesaid, his instrument in writing, duly signed and executed by him, requesting and requiring that certain lands, amounting to eight thousand (8,000) acres, and which said lands are particularly mentioned and described in said last-mentioned instrument of writing, and which are a part of the said lands so as aforesaid granted to said corporation, The Portage Lake and Lake Superior Ship Canal Company, by said act of the Congress of the United States approved July 3, 1866, and so as aforesaid mentioned and described in and covered by the said two indentures or trust deeds so as aforesaid given, the one to the said D. Randolph Martin and Thomas T. Davis and the other to the said Charles L. Frost, hereinbefore recited, and has thereupon tendered with said instrument of writing for cancellation and as and for a payment for said release so requested and required by him, the said Wells, eighty bonds, each of the amount or denomination of five hundred dollars of principal, and each mentioned and described in and issued under and intended to be secured in and by
89 the said deed of trust to said D. Randolph Martin and Thomas T. Davis, of which said last-mentioned deed of trust the said party of first part hereunto is now such trustee, as hereinbefore stated and set forth, such last-mentioned bonds being numbered respectively as follows, viz: 501, 502, 503, 504, 505, 506, 507, 508, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000: Now, therefore, in pursuance of the clause, provisions, conditions, covenants, and agreements set forth and contained in the said two indentures or trust deeds hereinbefore mentioned and described and so as aforesaid given by the said corporation, The Portage Lake and Lake Superior Ship Canal Company, the one to the said D. Randolph Martin and Thomas T. Davis, as trustees, and the other to the said Charles L. Frost, as trustee, and for the purpose of carrying into effect such clauses and provisions, conditions, covenants, and agreements thereof, and for and in consideration of the premises and the surrender by the said party of the second part hereunto unto the said party of the first part hereunto, as such trustee as aforesaid, for cancellation of all the said eighty bonds so as aforesaid mentioned and described in and issued under and intended to be secured in and by the said deed of trust, for which the said party of the first part hereunto is now such trustee as aforesaid, all said eighty bonds being a sum equivalent to the lands mentioned and described in said written request and requirement of said party of the second part, and which are hereinafter released at and after the rate of five dollars per acre of and in the said bonds so as aforesaid mentioned

and described in and issued under and intended to be secured by the said deed of trust so given to the said D. Randolph Martin and Thomas T. Davis; and also in further consideration of one dollar, lawful money of the United States, by the said party of the second part hereunto to the said party of the first part hereunto well and truly in hand paid before the execution and delivery hereof, the receipt whereof is hereby acknowledged, and the said party of the second part therefrom released and discharged, the said party of the first part hereunto has remised, released, acquitted, and discharged, and by these presents doth remise, release, acquit, and discharge, of and from all the lien, charge, claim, incumbrance, burden, and operation of the said indenture or trust deed hereinbefore mentioned and described and so as aforesaid made, executed, and delivered by the said corporation, The Portage Lake and — Superior Ship Canal Company, to the said D. Randolph Martin and Thomas T. Davis, and bearing date the first day of July, A. D. 1868, and from the payment or securing of any other of the bonds mentioned and described in and issued under and intended to be secured by the said last-mentioned deed of trust, excepting only those of the said bonds so as aforesaid held and owned by the said party of the second part hereunto and so as aforesaid surrendered to be cancelled for the purpose of procuring the present release, all the following-described pieces, parcels, and tracts of land, which are respectively situate, lying, and being in the said State of Michigan, and which are designated and described as follows—that is to say: The north half (½) of northeast quarter (¼) and *north and* northeast quarter (¼) of northwest quarter (¼) of section twenty-one (21), in township thirty nine (39) north and range twenty-eight (28) west, containing one hundred and twenty (120) acres; also southwest quarter (¼) of northeast quarter (¼) and the northwest quarter and the west half of southwest quarter (¼) and the southeast quarter (¼) of southwest quarter (¼) and the southeast quarter (¼) of section seventeen (17), township thirty-nine (39) north, in range twenty-eight (28) west, containing four hundred and
91 eighty (480) acres of land; also north half (½) of northeast quarter (¼) and northwest quarter (¼) and southwest quarter (¼) of southwest quarter (¼) and east half (½) of southwest quarter (¼) and the southeast quarter section of section fifteen (15), in township thirty-nine (39) north, in range twenty-eight (28) west, containing five hundred and twenty (520) acres of land; also the southwest quarter (¼) of northeast quarter (¼) and south half of the northwest quarter (¼) and south half (½) of section eleven (11), in township thirty-nine (39) north, range twenty-nine (29) west, containing four hundred and forty (440) acres; and also the northwest quarter (¼) of northwest quarter (¼) of section thirteen (13), in township thirty-nine (39) north and range twenty-nine (29) west, containing forty (40) acres of land; also northeast quarter (¼) of section — and south half (½) of the northwest quarter (¼) and the east fractional half (½) of the southeast quarter (¼) and the northwest quarter (¼) of southeast quarter (¼) and the north half (½) of the southwest quarter (¼) of section nine, in township thirty-nine (39)

north of range twenty-nine (29) west, containing four hundred and fourteen and $\frac{20}{100}$ ($414\frac{20}{100}$) acres; also northwest quarter of the northwest quarter ($\frac{1}{4}$) of section eight (8), in township thirty-nine (39) north of range twenty-nine (29) west, containing — (40) acres. Also south half ($\frac{1}{2}$) of section five (5), in township thirty-nine (39) north, in range twenty-nine west, containing three hundred and twenty (320) acres. Also northwest quarter ($\frac{1}{4}$) of the southwest quarter ($\frac{1}{4}$), south fractional half ($\frac{1}{2}$) of southwest quarter ($\frac{1}{4}$) and southwest quarter ($\frac{1}{4}$) of southeast quarter ($\frac{1}{4}$) of section six (6), township thirty-nine (39) north of range twenty-nine west, containing one hundred and forty-two and $\frac{51}{100}$ ($142\frac{51}{100}$) acres. Also the southeast quarter ($\frac{1}{4}$) and the southwest fractional quarter ($\frac{1}{4}$) and northwest quarter ($\frac{1}{4}$) and south half ($\frac{1}{2}$) of northeast quarter ($\frac{1}{4}$) and northwest quarter ($\frac{1}{4}$) of the northeast quarter ($\frac{1}{4}$) of section twenty-five (25), township forty (40) north, in range thirty west, containing five hundred and fifty-five $\frac{45}{100}$ ($555\frac{45}{100}$) acres of land.

92 Also northeast quarter ($\frac{1}{4}$) of section — and lots one (1), four (4), and five (5), in section twenty-six (26), township forty (40) north, in range thirty (30) west, containing two hundred and forty-five and $\frac{80}{100}$ ($245\frac{80}{100}$) acres of land, excepting and reserving four $\frac{70}{100}$ ($4\frac{70}{100}$) acres in a square form in the northeast corner of said northeast quarter of said section. Also northwest quarter ($\frac{1}{4}$) and the north half ($\frac{1}{2}$) of northeast quarter ($\frac{1}{4}$) and southwest quarter ($\frac{1}{4}$) of northeast quarter ($\frac{1}{4}$) and south half ($\frac{1}{2}$) of section twenty-seven (27), township forty (40) north, in range thirty (30) west, containing five hundred and ninety-one (591) acres of land. Also southeast quarter ($\frac{1}{4}$) of the northwest quarter ($\frac{1}{4}$) and lots three (3) and four (4), in section thirty-five (35), township forty (40) north, in range — (30) west, containing one hundred and one $\frac{75}{100}$ ($101\frac{75}{100}$) acres of land. Also northeast quarter ($\frac{1}{4}$) of the northeast quarter ($\frac{1}{4}$) of section thirty-four (34), township forty (40) north, in range — (30) west, containing forty (40) acres of land. Also south half ($\frac{1}{2}$) of southeast quarter ($\frac{1}{4}$) of section twenty-three (23), township forty (40) north, in range thirty (30) west, containing eighty (80) acres of land. Also east half ($\frac{1}{2}$) of northwest quarter ($\frac{1}{4}$) and northwest quarter ($\frac{1}{4}$) of the northwest quarter ($\frac{1}{4}$) and the east half ($\frac{1}{2}$) of the southeast quarter ($\frac{1}{4}$) and northwest quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$) and lots one (1), two (2), and three (3) of section twenty-one (21), township forty (40) north, in range thirty (30) west, containing three hundred and seventy-eight $\frac{55}{100}$ ($378\frac{55}{100}$) acres of land. Also south half ($\frac{1}{2}$) of southeast quarter ($\frac{1}{4}$) and southwest quarter ($\frac{1}{4}$) of section seventeen (17), township forty (40) north and in range thirty (30) west, containing two hundred and forty (240) acres of land.

Also southwest quarter ($\frac{1}{4}$) of the southwest quarter ($\frac{1}{4}$) and lots one (1) and two (2), in section eighteen (18), township forty (40) north and range thirty (30) west, containing one hundred $\frac{86}{100}$ ($100\frac{86}{100}$) acres of land.

93 Also northwest quarter ($\frac{1}{4}$) of the northwest quarter ($\frac{1}{4}$) and southeast fractional quarter ($\frac{1}{4}$) of northeast quarter and lot two (2), in section nineteen (19), township forty (40)

north, in range thirty (30) west, containing one hundred and eight $\frac{29}{100}$ (108.29) acres of land; also north half ($\frac{1}{2}$) of southeast quarter ($\frac{1}{4}$) and southeast quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$) and south half ($\frac{1}{2}$) of northwest quarter ($\frac{1}{4}$) and north half ($\frac{1}{2}$) of southwest quarter ($\frac{1}{4}$), in section twenty-five (25), township forty (40) north, in range thirty-one (31) west, containing two hundred and eighty (280) acres of land; also north half ($\frac{1}{2}$) of section twenty-six (26), township forty (40) north, in range thirty-one (31) west, containing three hundred and twenty (320) acres of land; also lots three (3) and four (4), in section thirteen (13), township forty (40) north, in range thirty-one (31) west, containing forty-five $\frac{40}{100}$ (45.40) acres of land; also north fractional half ($\frac{1}{2}$) and north half ($\frac{1}{2}$) of southeast quarter ($\frac{1}{4}$) and southwest fractional quarter ($\frac{1}{4}$) of section thirty-one (31), township forty-two (42) north, in range twenty-eight (28) west, containing five hundred and sixty $\frac{89}{100}$ (560.89) acres of land; also north half ($\frac{1}{2}$) and north half ($\frac{1}{2}$) of southeast quarter ($\frac{1}{4}$) and north half ($\frac{1}{2}$) of southwest quarter ($\frac{1}{4}$) of section thirty-five (35), township forty-two (42) north, in range twenty-nine (29) west, containing four hundred and eighty (480) acres of land; also north half ($\frac{1}{2}$) and north half ($\frac{1}{2}$) of southeast quarter ($\frac{1}{4}$) of section thirty-three (33), township forty-two (42) north, in range twenty-nine (29) west, containing four hundred (400) acres of land.

Also east half ($\frac{1}{2}$) section thirty-three (33), township forty-two (42) north, in range thirty (30) west, containing three hundred and twenty (320) acres of land.

Also northeast quarter ($\frac{1}{4}$) and the southeast quarter ($\frac{1}{4}$) and the north half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) and the southeast quarter ($\frac{1}{4}$) of the northwest quarter ($\frac{1}{4}$) and the northeast quarter ($\frac{1}{4}$) of the southwest quarter ($\frac{1}{4}$) of section thirty-one (31), township forty-two (42) north, in range twenty-nine (29), containing four hundred and eighty (480) acres of land.

94 Also south half ($\frac{1}{2}$) of the southwest quarter ($\frac{1}{4}$) and the north half ($\frac{1}{2}$) of the southeast quarter ($\frac{1}{4}$) of section thirty-five (35), township forty-two (42) north, in range thirty (30) west, containing one hundred and sixty (160) acres of land, and which said lands and premises amount in all to eight thousand (8,000) acres of land, be the same more or less, the same being respectively parts and portions of the said two hundred thousand acres of land so as aforesaid granted by the said act of Congress approved July 3, 1866, to inure to the use and benefit of the corporation, The Portage Lake and Lake Superior Ship Canal Company; to have and to hold the said several tracts, pieces, and parcels of land and each and every of them and every part thereof to the said party of the second part hereunto, his heirs and assigns, forever, remised, released, acquitted, and discharged of and from all or any lien, charge, claim, and encumbrance, burden, and operation arising or to arise under or by virtue of the said deed of trust of the date of July 1, 1868, so as aforesaid executed and delivered to the said Martin and Davis, and pursuant to the provisions of the said two indentures or deeds of trust hereinbefore particularly recited and set forth, save and except, however, that the said several pieces, parcels, and tracts of land so as afore-

said released from such encumbrance of the said deed of trust to the said Martin and Davis shall still after this release be owned and held by the said corporation, The Portage Lake and Lake Superior Ship Canal Company, subject only to the encumbrance created by the said deed of trust to the said Charles L. Frost to the amount of the bond or bonds thereby secured owned by the said Jonathan Tremain Wells, the party so securing the present release, together with the amount of the said bonds so as aforesaid secured by the said indenture or trust deed to the said D. Randolph Martin and Thomas T. Davis which have been so as aforesaid given for the present release added thereunto.

95 In witness whereof the said party of the first part, acting as such trustee as aforesaid, hath hereunto set his hand and seal the day and year first above written.

LUCIEN BIRDSEYE, [L. S.]
As Trustee Aforesaid.

Signed, sealed, and delivered in presence of—
HENRY WOODRUFF.
WILLIAM H. CLARKSON.

STATE OF NEW YORK, *City and County of New York,* } ss:

On this 11th day of August, A. D. 1873, before me, William H. Clarkson, a commissioner of deeds of the State of Michigan in and for the State of New York, residing in said city of New York, personally appeared Lucien Birdseye, named in the foregoing instrument, known to me to be the person described in and who executed the foregoing instrument, and he acknowledged the same to be his free act and deed as trustee therein described.

In witness whereof I have hereunto set my hand and affixed my official seal this 11th day of August, A. D. 1873.

[SEAL.] WILLIAM H. CLARKSON,
Commissioner for Michigan in New York,
117 *Broadway, New York City.*

STATE OF MICHIGAN, *County of Menominee,* } ss:

I, Joseph Fleshiem, register of deeds in and for said county, do hereby certify that I have compared the foregoing copy of the record with the original record thereof as recorded in my office in Liber "B" of Mortgages, on pages 586, 587, 588, 589, 590, 591,
96 592, 593, 594, 595, 596, and 597, and that the same is a correct transcript therefrom and of the whole of such original record.

In witness whereof I have hereunto set my hand and affixed the register's seal, at Menominee, this 24th day of January, A. D. 1879.

JOSEPH FLESHIEM,
Register of Deeds.

EXHIBIT E.

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court-room, in the city of Detroit, on Monday, the twelfth day of February, in the year one thousand eight hundred and seventy-seven.

Present: Honorable Halmer H. Emmons, circuit judge; Honorable Henry B. Brown, district judge.

(Judge Brown did not participate in the annexed proceedings.—A. Mandell, clerk.)

97 Circuit Court of the United States for the Eastern District of Michigan. In Equity.

JOHN L. SUTHERLAND, Trustee, Complainant,
ag'st
THE LAKE SUPERIOR SHIP CANAL, RAILROAD AND IRON Company, Charles L. Frost, Trustee; Thomas N. McCarter, Trustee; Lucien Birdseye, Trustee; The Union Trust Company of New York, Trustee; Samuel L. Smith, William Harris, and George Jerome and Fernando C. Beaman, Assignees in Bankruptcy of the Aforesaid Ship Canal, Railroad and Iron Company, Defendants. } 1568.

LUCIEN BIRDSEYE, Trustee, Complainant,
against
THE LAKE SUPERIOR SHIP CANAL, RAILROAD AND IRON Company, Thomas N. McCarter, Trustee; The Union Trust Company of New York, Trustee, and George Jerome and Fernando C. Beaman, Assignees in Bankruptcy of The Lake Superior Ship Canal, Railroad and Iron Company, Defendants. } 1574.

98 THE UNION TRUST COMPANY OF NEW YORK, Trustee, Complainant,
against.
GEORGE JEROME and FERNANDO C. BEAMAN, Assignees in Bankruptcy of The Lake Superior Ship Canal, Railroad and Iron Company, and The Lake Superior Ship Canal, Railroad and Iron Company, Defendants. } 1946.

Supplemental and Cross-Bill.

GEORGE JEROME and FERNANDO C. BEAMAN, Assignees in Bankruptcy of The Lake Superior Ship Canal, Railroad and Iron Company, Complainants,
against
JOHN L. SUTHERLAND, Trustee; CHARLES L. FROST, Trustee; Lucien Birdseye, Trustee; Thomas N. McCarter, Trustee; Frederick D. Tappan, Trustee; The Union Trust Company of New York, Jonathan T. Wells, Samuel L. Smith, and William Harris, Defendants. } 1766.

99 And now come Meddaugh & Driggs, solicitors for the assignees in bankruptcy in said causes, and move the court that the aforesaid supplemental and cross-bill be held and considered as a cross-bill to all of the above-entitled causes, and that the proofs heretofore taken in each of the said causes be considered as taken in all, and that the above-entitled causes be all brought on to be heard together and be heard as one cause.

And the court having heard Messrs. Meddaugh & Driggs in support of said motion, and Alfred Russell Esq., solicitor for the complainants in the three original causes above named consenting thereto, it is ordered and adjudged that the said motion be, and the same hereby is, granted, and that the said cross-bill be held and treated as a cross-bill in each of the three causes first above named, and that the said four causes above named be brought on for hearing together upon the pleadings and proofs in all the said causes, and that the proofs in each cause be considered and treated as introduced in all.

100 EXHIBIT F.

Circuit Court of the United States for the Eastern District of Michigan. In Equity.

JOHN L. SUTHERLAND, Trustee, Complainant,
ag'st
THE LAKE SUPERIOR SHIP CANAL, RAILROAD AND IRON Company, Charles L. Frost, Trustee; Thomas N. McCarter, Trustee; Lucien Birdseye, Trustee; The Union Trust Company of New York, Trustee; Samuel L. Smith, William Harris, and George Jerome and Fernando C. Beaman, Assignees in Bankruptcy of the Aforesaid Ship Canal, Railroad and Iron Company, Defendants. } 1568.

101 LUCIEN BIRDSEYE, Trustee, Complainant,
ag'st
THE LAKE SUPERIOR SHIP CANAL, RAILROAD AND IRON Company, Thos. N. McCarter, Trustee; The Union Trust Company of New York, Trustee, and George Jerome and Fernando C. Beaman, Assignees in Bankruptcy of The Lake Superior Ship Canal, Railroad and Iron Company, Defendants. } 1571.

THE UNION TRUST COMPANY OF NEW YORK, Trustee, Complainant,
ag'st
GEORGE JEROME and FERNANDO C. BEAMAN, Assignees in Bankruptcy of The Lake Superior Ship Canal, Railroad and Iron Company, and The Lake Superior Ship Canal, Railroad and Iron Company, Defendants. } 1946.

102 *Supplemental and Cross-Bill.*

GEORGE JEROME and FERNANDO C. BEAMAN, Assignees in Bankruptcy of The Lake Superior Ship Canal, Railroad and Iron Company, Complainants,
ag'st
JOHN L. SUTHERLAND, Trustee; CHAS. L. FROST, Trustee; Lucien Birdseye, Trustee; Thomas N. McCarter, Trustee; Frederick D. Tappan, Trustee; The Union Trust Company of New York, Trustee; Jonathan T. Wells, Samuel L. Smith, and William Harris, Defendants. } 1766.

These causes came on to be heard together as one cause, pursuant to previous order at this term, and were argued by counsel; and thereupon and upon consideration thereof it is ordered, adjudged, and decreed as follows, to wit:

First. That the said The Lake Superior Ship Canal, Railroad and Iron Company, under its former name of the Portage Lake and Lake Superior Ship Canal Company, did duly authorize the issue of and did issue the series of bonds set forth in the bill brought by John L. Sutherland, trustee, namely, one thousand bonds of five hundred dollars each, numbered from 1 to 1000, bearing date the first day of July, 1865, each payable at the Ocean Bank, in the city of New York, on the first day of July, 1875, and bearing interest at the rate of ten per cent. per annum, payable semi-annually on the first days of January and July in each year, according to interest warrants thereto respectively attached.

103 Second. Also that the said company did duly authorize the execution of and did execute and deliver to Columbus C. Douglass, of the city of New York, as set forth in said last-named bill, the mortgage which is therein fully set forth and described, said mortgage bearing date the first day of July, 1865, and duly executed by the officers of said company under the seal thereof, and the execution duly proved and acknowledged so as to entitle the same to be recorded pursuant to the laws of the State of Michigan, and that the said mortgage was duly recorded in the proper counties where the mortgaged property is situated, and that the said mortgage was intended to secure and does secure the series of bonds described therein and which were issued as aforesaid.

Third. That the said mortgage was also executed by Columbus C. Douglass, the predecessor in the trust of the said John L. Sutherland, complainant above named, as trustee, on the day of the date of the said mortgage, and that said Columbus C. Douglass afterwards, on

the 9th day of March, 1867, resigned the trusteeship by an instrument under his hand and seal, duly recorded in the counties aforesaid, and that on the thirteenth day of the same month and year D. Randolph Martin, Esq., was, on proper petition, appointed his successor trustee by the Hon. George G. Barnard, a justice of the supreme court of the State of New York, by an instrument under his hand and seal, duly recorded as aforesaid, and that afterward, on the thirteenth day of April, 1872, the said D. Randolph Martin resigned his said trusteeship by an instrument under his hand and seal, duly recorded as aforesaid, and thereafter, on the eighteenth day of May, 1872, the said John L. Sutherland, complainant, was appointed trustee by the Hon. Daniel P. Ingraham, a judge of the supreme court of the State of New York, by an instrument under his hand and seal, which was duly recorded as aforesaid.

104 Fourth. That the said Lake Superior Ship Canal, Railroad and Iron Company, under its former name of the Portage Lake and Lake Superior Ship Canal Company, did duly authorize the issue of and did issue the series of bonds which are set forth in the above-framed bill brought by Lucien Birdseye, complainant, namely, one thousand bonds of five hundred dollars each, numbered from 1 to 1000, bearing date the first day of July, 1868, and each payable at the Ocean Bank, in the city of New York, and bearing interest at the rate of ten per cent. per annum, payable semi-annually on the first days of January and July in each year, according to interest warrants thereto respectively attached.

Fifth. Also that the said company did duly authorize the execution of and did duly execute and deliver, as set forth in said last-mentioned bill, the mortgage therein fully set forth and described to D. Randolph Martin, of the city of New York, and Thomas T. Davis, of the city of Syracuse, said mortgage bearing date the first day of July, A. D. 1868, duly executed by the officers of said company under the seal thereof, and the execution duly acknowledged and proved so as to entitle the same to be recorded under the laws of the State of Michigan, and that the said mortgage was duly recorded in the proper counties where the said mortgaged property is situated, and that the said mortgage was intended to secure and does secure the series of bonds described therein, and which were issued as aforesaid.

Sixth. That the said mortgage was also executed by said D. Randolph Martin and Thomas T. Davis, predecessors of the said Lucien Birdseye, trustee, complainant, on the day of the date of said mortgage, and that afterwards, on the thirteenth day of December, 1870, the said Martin and Davis resigned their trusteeship by an instrument under their hands and seals, duly recorded in the counties aforesaid, and thereupon, on the thirtieth day of December,

105 1870, the said Lucien Birdseye, complainant and trustee, was appointed trustee by the Hon. Daniel P. Ingraham, a justice of the supreme court of the State of New York, by an instrument under his hand and seal, which was duly recorded as aforesaid.

Seventh. That all the said one thousand bonds secured by said mortgage to Columbus C. Douglass, and also all the said one thou-

sand bonds secured by said mortgage to Thomas T. Davis and D. Randolph Martin, were issued, negotiated, and used by said ship canal company, and are now held by *bona fide* holders thereof for value.

Eighth. That the said Lake Superior Ship Canal, Railroad and Iron Company, under its former name of the Portage Lake and Lake Superior Ship Canal Company, did duly authorize the issue of and did issue the series of bonds which are set forth in the above-named bill brought by Thomas N. McCarter, trustee, namely, twelve hundred and fifty bonds, numbered from 1 to 1250, inclusive, each for one thousand dollars and each payable at the Ocean National Bank, in New York, on the first day of July, 1871, bearing date the first day of July, 1870, and bearing interest at the rate of seven per cent. per annum, payable half yearly on the first day of each month of January and July, A. D. 1871, according to interest warrants thereto respectively attached; that two hundred and fifty of the said bonds have been since retired and only one thousand of said bonds, amounting to one million dollars, besides interest, remain outstanding.

Ninth. Also that the said company did duly authorize the execution of and did duly execute and deliver, as set forth in said bill, the mortgage to Charles L. Frost, trustee, which is therein fully set forth and described, said mortgage bearing date the
106 first day of July, A. D. 1871, and duly executed by the officers of the said company under the seal thereof, and the execution thereof duly proved and acknowledged so as to entitle the same to be recorded under and pursuant to the laws of the State of Michigan, and that the said mortgage was duly recorded in the proper counties where the mortgaged property is situated, and that the said mortgage was intended to secure and does secure the series of bonds described therein and which were issued as aforesaid.

Tenth. That the said mortgage was also executed by Charles L. Frost, predecessor of the said Thomas N. McCarter, complainant, as trustee, on the day of the date thereof, and that the said Charles L. Frost, on the first day of July, 1872, resigned his trusteeship by an instrument under his hand and seal, duly recorded in the counties aforesaid, and that on the second day of the same month Thomas N. McCarter was appointed trustee by the Hon. William H. Leonard, a judge of the supreme court of the State of New York, by an instrument under his hand and seal, which was recorded as aforesaid.

Eleventh. That the said mortgage to Charles L. Frost was intended to and did cover and convey the ship canal of said Portage Lake and Lake Superior Ship Canal Company, together with all the corporate franchises of said company and all its real and personal property and its four hundred thousand acres of land in the upper peninsula of Michigan, received in two grants from the United States and the State of Michigan, expressly subject, however, to the two aforesaid mortgages made by said company, one made to Columbus C. Douglass, as trustee, conveying the said canal and its franchises and the two hundred thousand acres of land granted by act

of Congress of March 3d, 1865, and the other made to D. Randolph Martin and Thomas T. Davis, trustee as aforesaid, conveying the said canal and its franchises and the other property aforesaid
107 and also the two hundred thousand acres of land granted by act of Congress of July 3d, 1866, and that the said Lake Superior Ship Canal, Railroad & Iron Company made default in the payment of the principal of the said outstanding one thousand bonds secured by said mortgage to Charles L. Frost, trustee, and the interest coupons thereto attached or belonging, on the first day of July, A. D. 1871, and that the due demand of the same was made, and that the same remained overdue and unpaid, and that the same are now outstanding in the hands of *bona fide* holders for value.

Twelfth. That after the execution and delivery of the said mortgages said Portage Lake and Lake Superior Ship Canal Company, on the 29th day of April, A. D. 1871, duly executed amended articles of association amending its original articles of association, under and in pursuance of the provisions of section 2149, as amended in chapter 73 of the Compiled Laws of the State of Michigan, entitled "General provisions relating to corporations," so as, among other things, to change the name of said company from the Portage Lake and Lake Superior Ship Canal Company, by which it had before that time been known and designated, to the "Lake Superior Ship Canal, Railroad and Iron Company," by which title the said company, ever since the said twenty-ninth day of April, A. D. 1871, has been known and designated.

Thirteenth. That the said Lake Superior Ship Canal, Railroad and Iron Company did duly authorize the issue of the series of bonds which are set forth in the bill above named filed by The Union Trust Company of New York, complainant, namely, three thousand five hundred bonds of one thousand dollars each, payable in thirty years from the first day of May, 1871, with interest at seven and three-tenths per cent., payable semi-annually on the first days of May and November, in gold, and principal and interest payable at the office of the Union Trust Company, in New York, ac-
108 cording to interest warrants thereto attached, the said bonds bearing date the first day of July, 1871, and that thirteen hundred of such bonds were duly issued by said company and duly executed by said Union Trust Company of New York, as trustee, and were negotiated and used by said ship canal, railroad and iron company, and are now outstanding in the hands of *bona fide* holders for value, and that twenty-two hundred of said bonds are still in the custody of the Union Trust Company of New York not issued.

Fourteenth. That the said ship canal, railroad and iron company did duly authorize the execution of and did duly execute and deliver to the Union Trust Company of New York, as set forth in said bill, the mortgage therein fully set forth and described, bearing date the first day of May, 1871, and duly executed by the officers of said company under the seal thereof, and the execution thereof duly proved and acknowledged so as to entitle the same to be recorded under and pursuant to the laws of the State of Michigan, and that the said mortgage was duly recorded in the counties where the mort-

gaged property is located, and that the said mortgage was intended to secure and does secure the series of bonds therein described, to wit, thirteen hundred bonds actually issued as aforesaid, and that the said mortgage was intended to and did cover all the property of said company hereinbefore described, and was made expressly subject to all the prior mortgages hereinbefore described, and that the said Union Trust Company mortgage was also intended to cover two hundred thousand acres of land known as the "wagon-road" lands, which were acquired from the State of Michigan by one Francis W. Anthony and which were subscribed to the capital stock of said company under the provisions of the laws of the State of Michigan; that the said Union Trust Company mortgage did actually cover forty-seven thousand nine hundred and fifty-eight and eighty-five one-hundredths acres of the said wagon-road lands, to wit, the lands particularly described in Exhibit C attached to the bill filed by the said
109 Union Trust Company of New York, and that the said thirteen hundred bonds issued by said Union Trust Company are a first lien on the said forty-seven thousand nine hundred and fifty-eight and eighty-five one-hundredths ($47{,}958\frac{85}{100}$) acres of land; that the title to the remainder of said wagon-road lands passed from the State of Michigan to third parties, so that as to the same the said Union Trust mortgage covers only a possible equity, which equity in the said residue of said two hundred thousand acres of wagon-road lands is also a security for said thirteen hundred bonds, and that said Union Trust Company mortgage is a first lien upon the said wagon-road lands, and that as to said other property and land, to wit, said canal franchises and four hundred thousand acres of land, it is a lien prior and subsequent to the said McCarter, Birdseye, and Sutherland mortgages, so designated—that is to say, the mortgages in which the last-named persons are respectively present trustees as aforesaid—and to the receiver's certificates hereinafter mentioned.

Fifteenth. That this court did duly authorize its receiver, heretofore appointed under said bill brought by John L. Sutherland, trustee, to issue, and that the said receiver did issue, two series of receiver's certificates of indebtedness, the first series consisting of five hundred certificates, numbered 1 to 500, inclusive, each for one thousand dollars, and each payable at the National Park Bank, in New York, on the first day of July, 1873, bearing date the first day of July, 1872, and bearing interest at the rate of ten per cent. per annum, the second series consisting of one hundred and thirty-eight certificates (but of which twelve of one thousand dollars each remain unissued), the entire series being numbered from 1 to 138, inclusive, each for one thousand dollars except the last, which was for three hundred dollars, and each payable in New York on the first day of May, 1875, bearing date the first day of May, 1874, and bear-
110 ing interest at the rate of ten per cent., and that the said certificates are a first lien upon the said ship canal and corporate franchises and upon the said two land grants of two hundred thousand acres each, paramount to the liens of all the mortgages

hereinbefore set forth, but are not a lien upon any of the said wagon-road lands *and* hereinbefore mentioned.

Sixteenth. That the said Lake Superior Ship Canal, Railroad and Iron Company made default in the payment of the principal of all said several issues of bonds or of the interest coupons thereto severally attached, or both, and that due demand of the same was made as they respectively became due, and that the said ship canal company remained in default for over sixty days after the dates when said principal or interest moneys, respectively, matured and after the said overdue bonds and coupons, respectively, were presented and prior to the beginning of all the aforesaid suits, and that the holders of more than fifty of each of said issues of bonds, respectively, did thereafter respectively request said trustees, complainants, respectively, to file the said respective bills of foreclosure.

Seventeenth. That the Governor of the State of Michigan duly appointed agent according to law, who selected the four hundred thousand acres of land comprised in the aforesaid grants from the public lands in the upper peninsula of Michigan subject to private entry, and not homestead, pre-emption, or mineral land, and that full lists and descriptions of said four hundred thousand acres of land were approved by the Secretary of the Interior and certified to said State according to law and were deposited and remain of record in the Land Office of the United States at Washington and in the proper office of the State of Michigan, at Lansing, and that true copies of said lists and description of the four hundred thousand acres of canal-grant land so selected are on file in the proofs under the said bill brought by Thomas N. McCarter, trustee, attached to the deposition of George L. Frost,
111 who was one of the said agents, and that all of the mortgages hereinbefore mentioned and all the receiver's certificates of indebtedness hereinbefore mentioned and issued as aforesaid and hereinbefore declared to be liens in the order of preference hereinbefore set forth upon said four hundred thousand acres of land described in said mortgages solely by reference to said acts of Congress and of the State of Michigan, and not by parcels to cover and convey, *and* are valid liens upon each and every parcel of land set forth and described in the aforesaid lists and descriptions of said four hundred thousand acres, and that said lands lie partly in the eastern and partly in the western districts within the State of Michigan, to wit, that part of said lands — situated in the counties of Delta and Menominee, lying in the western district of Michigan, and the remainder in the eastern district of Michigan.

Eighteenth. That the said wagon-road lands lie in the eastern district of Michigan, and that a description of the parcels of said wagon-road lands is attached as Exhibit "C" to the bill filed by the Union Trust Company of New York, which exhibit is the certificate of purchase number 1 of military road land under act No. 20 of the laws of 1864, approved February 4, 1864, and which certificate, Exhibit "C," is a true copy of the list and certificate on file in the office of secretary of state of the State of Michigan, and that the said Union Trust Company mortgage is a first lien upon each and

every parcel of land set forth in said list or certificate, and is also a first lien upon any right or estate of the said mortgagor company in and to the rest and residue of the said two hundred thousand acres of wagon-road lands.

Nineteenth. That all the said receiver's certificates of indebtedness except twelve, as before mentioned, were issued, negotiated, and used and are still outstanding and held by *bona fide* holders for value, and that the same are a first and paramount lien
112 upon all of the property aforesaid except the wagon-road lands mentioned in the next preceding paragraph of this decree, and that the amount due upon both series of said receiver's certificates of indebtedness at the date of this decree is the sum of nine hundred and thirty-four thousand four hundred and seventy-eight dollars.

Twentieth. That as to seven hundred and forty-seven bonds of the issue secured by the said Sutherland mortgage, and as to eight hundred and forty-one bonds of the issue secured by the said Birdseye mortgage, and as to nine hundred bonds of the issue secured by the said McCarter mortgage, and as to seven hundred and eighty-six bonds of the issue secured by the said Union Trust Company mortgage, it is in proof in the said cause under the said supplemental and cross-bill that they are now held by *bona fide* holders for value, and that the persons named in Schedule "A" attached to this decree as holding said bonds are absolute owners in good faith for the value of the bonds stated in said schedule respectively as held by them, and that the several sums due to the several holders of the said bonds of different issues and interest warrants, as well for principal as for the interest that is secured and remains unpaid up to the date of this decree, according to the computation made by the court attached to this decree and made a part hereof, marked Schedule "A," amount to the sum of ($3,361,657.18) three millions three hundred and sixty-one thousand six hundred and fifty-seven $\frac{18}{100}$ dollars, and that sundry other bonds of each of said four issues remain outstanding and unpaid, and the holders thereof and the amounts due thereon remain to be ascertained in the manner hereinafter provided.

Twenty-first. It is further ordered, adjudged, and decreed that the attempt of the defendant, Jonathan T. Wells, to redeem or obtain release of certain lands from the lien of the mortgage of first July, 1868, and the alleged release of said land by Lucien Birds-
113 eye, trustee, as set forth in said cross-complaint, having taken place after the institution of the suit for foreclosure of said mortgage, were and are ineffectual and void.

Twenty-second. And it is further ordered, adjudged, and decreed that unless the said Lake Superior Ship Canal, Railroad and Iron Company or the said George Jerome and Fernando C. Beaman, assignees in bankruptcy of the said Lake Superior Ship Canal, Railroad and Iron Company, do pay or cause to be paid into the registry of this court for distribution to the holders named in Schedule "A," *pro rata* with any amount that may hereafter be found to be due to the holders of the other bonds not yet ascertained, the amount so com-

puted and decreed to be due to the holders named in Schedule "A" as aforesaid, together with the interest thereon from the date of this decree, and also the costs of these suits prior to the sale of said property, as hereinafter provided, that all and singular the said mortgaged ship canal, corporate franchises, personal property, two land grants of two hundred thousand acres of land each, forty-seven thousand nine hundred and fifty-eight and eighty-five one-hundredths acres of wagon-road lands, and all the right and equity of the said ship canal company in the residue of said two hundred thousand acres of wagon-road lands, being the property mentioned in the various bills of complaint mentioned in this cause, be sold at public auction by or under the direction of Addison Mandell, Esq., a master in chancery in this court, or, in case of his death, absence, or inability to act, by any other master in chancery of this court, and that the sale be made at the front door of the court-house, in the county of Houghton, in said district, in which county said canal, personal property, and a part of said six hundred thousand acres of land are situated.

Twenty-third. And this court now finds upon the proofs
114 that the sale of said property ought to take place in the manner and parcels next therein specified, and it is accordingly ordered, adjudged, and decreed—

First. That the property covered and conveyed by the said Union Trust Company mortgage—that is to say, the forty-seven thousand nine hundred and fifty-eight eighty-five one-hundredths acres of wagon-road lands, being that portion of said lands particularly described in Exhibit "C" attached to the Union Trust Company bill—together with all the equity of redemption or other right or interest of said mortgagor corporation in the residue of said wagon-road lands, and also all the equity of redemption or other right or interest of said mortgagor corporation as covered by the same mortgage in and to the residue of the aforesaid property, viz., the said ship canal and corporate franchises and four hundred thousand acres of canal-grant lands, shall be offered, struck off, and sold as one parcel, firstly, at said sale.

That, secondly, at said sale all the property covered by the said Birdseye mortgage—that is to say, the two hundred thousand acres of land granted by the act of Congress of July 3, 1866—together with the equity of redemption and all other right or interest of said mortgagor corporation as covered by the last-mentioned mortgage in and to the said ship canal; corporate franchises, and two hundred thousand acres of land granted by the act of Congress of March 3, 1865, shall be offered, struck off, and sold also as one parcel; and

That, thirdly, at said sale the property covered by the said Sutherland mortgage—that is to say, the said ship canal and corporate franchises and the two hundred thousand acres of land granted by said act of Congress of March 3, 1865, as contained in the aforesaid lists and descriptions thereof—shall be offered, struck off, and sold also as one parcel—that is to say, that the sale of the said property
covered by the Union Trust mortgage, excepting the said
115 wagon-road lands, shall be made subject to the liens of the

said McCarter mortgage, the said Birdseye and Sutherland mortgages, and the said receiver's certificates, and that the sale of the property covered by the Birdseye mortgage shall be made free of incumbrance, except as to the canal, corporate franchises, and land grant of March 3, 1865, the sale of which shall be made subject to the lien of said Sutherland mortgage, and that the sale of the property covered by the said Sutherland mortgage shall be made free from any incumbrance; and

That, fourthly, at said sale the personal property covered by said Sutherland mortgage shall be sold in view of the same where it lies, in county of Houghton, in said district, and that if it be necessary in order to so sell the same the said master may orally adjourn the said sale of personal property to the place or places where the said personal property may be in said county, and from — to day or otherwise as may be necessary.

Twenty-fourth. A. That the proceeds of the said sales shall be apportioned and paid out in the manner following, to wit:

(1.) That the proceeds of the personal and real property covered by the Sutherland mortgage shall form one fund.

(2.) That the proceeds of the property covered by the Birdseye mortgage shall form another fund.

(3.) That the proceeds of the property covered by the Union Trust mortgage shall form another fund.

B. That the taxable costs under the various bills above entitled shall be apportioned upon and paid ratably out of said funds.

116 C. That the amount due upon the said two series of the said receiver's certificates of indebtedness shall be next paid out of the said Sutherland fund and out of the said Birdseye fund ratably according to the amount produced by the respective sales.

D. That out of any balance remaining in the Sutherland fund the amounts found due upon the said respective Sutherland bonds shall be paid *pro rata*, and if any balance shall remain after such payment it shall be added to the said Birdseye fund.

E. That out of the said Birdseye fund there shall first be paid the balance, if any, due upon the first and second issues of said receiver's certificates of indebtedness, and out of any surplus remaining after such payment the amounts found due upon the respective Birdseye bonds shall be paid, and if any surplus shall remain after such payment the same shall be applied upon the decree heretofore made by this court in this cause in which Thomas N. McCarter, trustee, was complainant and the said ship canal company and others defendants; and if after the payment of the amount found due under the said last-mentioned decree there shall remain any balance the same shall be added to the aforesaid fund arising from the sale of the property covered by the said Union Trust mortgage.

F. That said last-named fund shall be applied to the payment of the amount found due upon the said thirteen hundred Union Trust bonds, respectively, and that any surplus remaining after such payment shall be paid to the said assignees in bankruptcy.

Twenty-fifth. That in payment of the various bids the said certifi-

cates of indebtedness and the bonds of the different issues shall be received in manner following, to wit:

117 A. The said receiver's certificates of indebtedness of both series shall be received in payment of bids for the Sutherland and Birdseye properties in the proportions that said properties are respectively chargeable with the payment of said certificates, as hereinbefore declared.

B. And for any balance that may remain due upon the bid for the Sutherland property the bonds issued under the Sutherland mortgage shall be received in payment, but not exceeding the amounts found due upon the said bonds, respectively, nor exceeding their *pro rata* valuation as ascertained by the amount of the said last-mentioned bid.

C. And for any balance that may remain due upon the bid for the Birdseye property the bonds issued under the Birdseye mortgage shall be received in payment, but not exceeding the amounts found due upon the said bonds, respectively, nor exceeding their *pro rata* valuation as ascertained by the amount of the said last-mentioned bid.

D. And for the bid upon the Union Trust property the bonds issued under the Union Trust mortgage shall be received in payment, but not exceeding the amounts found due upon the said bonds, respectively, nor exceeding their *pro rata* valuation as ascertained by the amount of the said last-mentioned bid.

Twenty-sixth. It is further ordered, adjudged, and decreed that said master give notice of the time and place of said sale, according to the course and practice of this court, which notice shall set forth the order and manner of said sale, according to paragraph twenty-third of this decree, and may describe said lands generally as they are described in said mortgages or by quantity and general description as contained in the respective counties, and need not describe them in detail according to the description of parcels as found in said list of selections on file.

118 Twenty-seventh. And it is further ordered, adjudged, and decreed that as soon as possible after the filing of his report of sale, which report shall describe said lands generally as described in the mortgage or as contained in the respective counties, and need not contain detailed descriptions of parcels as found in said list of selections on file, and after the confirmation of said report and sale, said master shall proceed to ascertain the holders of and the amount due upon the outstanding bonds held by persons not mentioned in Schedule "A," and any coupons which may be thereto attached or belonging thereto or otherwise outstanding unpaid and held by *bona fide* owners for value, and that he fix a reasonable time and place for the production before him of any such bonds and for proof of the amount due thereon, and give notice thereof to the solicitors for said assignees and the complainants in the said bill of foreclosure, and in case such amount shall not be proved satisfactorily before him that he have authority to adjourn the hearing and publish a notice for at least thirty days daily, Sundays and holidays excepted, in one daily newspaper printed and published in the city of Detroit and

in one daily newspaper printed and published in the city of New York, requiring all holders or owners to produce said bonds and coupons before him at a given time and place, to which the hearing shall have been adjourned, and shall send by mail, postpaid, a copy of such notice to the persons who, upon diligent inquiry to be made by said master, shall appear to hold any of said bonds, and said master may adjourn said hearing, in his discretion, and upon completion thereof shall file his report of the same with the proofs taken by him.

Twenty-eighth. And it is further ordered, adjudged, and decreed that upon the coming in and confirmation of said report concerning the holders of and the amount due upon bonds not included in Schedule "A," and any coupons thereto attached or belonging thereto,
119 the register of the court shall make distribution of the remaining funds among the holders of the bonds so proved before the master according to their respective rights as hereinbefore declared, and shall cancel the bonds, if fully paid, and otherwise shall endorse upon the bonds the amount paid.

Twenty-ninth. It is further ordered, adjudged, and decreed that the said defendants, The Lake Superior Ship Canal, Railroad and Iron Company and George Jerome and Fernando C. Beaman, assignees in bankruptcy of the said Lake Superior Ship Canal, Railroad and Iron Company, and all persons claiming or to claim from and under them, be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged ship canal, corporate franchises, four hundred thousand acres of canal-grant lands, two hundred thousand acres of wagon-road lands, and personal property aforesaid and every part and parcel thereof.

Thirtieth. And it is further ordered that the purchaser or purchasers of said ship canal, corporate franchises, four hundred thousand acres of canal-grant lands, and two hundred thousand acres of wagon-road lands at such sale be let into possession thereof, and that any of the parties to said causes who may be in possession of said property or any part thereof and any person who, since the commencement of said suits, has come into possession under them or either of them deliver possession thereof to the purchaser or purchasers on production of the master's deed thereof and a certified copy of the order confirming the report of such sales after such order has become absolute.

Thirty-first. And it is further ordered, adjudged, and decreed that if the moneys arising from said sale shall be insufficient to pay the amounts so computed due to said holders of the bonds included in Schedule "A" and subsequently found to be due to the holders of the bonds not included in Schedule "A" or any
120 part thereof, after such distribution by the master, with interest, costs, and expenses of the sale as aforesaid, the said defendant, The Lake Superior Ship Canal, Railroad and Iron Company, which is in its corporate capacity liable for the debts secured by said respective mortgages, do pay to the complainants therein, respectively, in the order of their respective preferences, the amounts

of such deficiencies, with interest thereon, and that the said respective complainants have executions therefor.

Thirty-second. The descriptions of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgages above referred to or from the pleadings, proceedings, and proofs in this cause, are as follows:

1. The ship canal belonging to said Lake Superior Ship Canal, Railroad and Iron Company, extending from Portage Lake to Lake Superior, through the neck of land called the Portage, at Portage Lake, Kewenaw Point, Lake Superior, in said district, and connecting the waters of Lake Superior with the waters of Portage Lake, with all its appurtenances, and including all lands, tenements, and hereditaments necessary to the full use and enjoyment of said canal and covered by said mortgages or any of them, together with all the rights and franchises growing out of or appertaining to said ship canal, and together with all its corporate rights and franchises of said Lake Superior Ship Canal, Railroad and Iron Company.

2. All the vessels, tugs, dredges, and equipments, together with all other goods or chattels of said company in any way relating to or appertaining to or connected with said ship canal or the using or operating the same.

3. All and singular the four hundred thousand acres of land, being the same granted to the said Lake Superior Ship Canal, Railroad and Iron Company under its former name of the Portage Lake and Lake Superior Ship Canal Company by two several acts
121 of Congress, the first being entitled "An act granting lands to the State of Michigan to aid in building a harbor and ship canal at Portage Lake, Kewenaw Point, Lake Superior," approved March 3d, 1865, and granted and conferred upon said Portage Lake and Lake Superior Ship Canal Company by act of the Legislature of the State of Michigan passed on or about the 18th of March, 1865, entitled "An act to accept a grant of land by act of Congress to aid in the construction of the ship canal and harbor at the head of Portage Lake to connect with Lake Superior and to provide for the construction of the same," and the second by An act of Congress entitled "An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Kewenaw Point, Lake Superior, in said State," approved July 3d, 1866, accepted by said State by act of March 27, 1867, and enuring to said Lake Superior Ship Canal and Railroad Company by virtue of said act of Congress, and all and singular forty-seven thousand nine hundred and fifty-eight and eighty-five one-hundredths acres of land subscribed to the capital stock of the said Lake Superior Ship Canal, Railroad and Iron Company, and therefore acquired from the State of Michigan by one Francis N. Anthony, and being parcel of two hundred thousand acres of so-called wagon-road lands acquired from the State aforesaid by Francis N. Anthony aforesaid under the provisions of act No. 20 of the laws of the State of Michigan of 1864, approved February 4th, 1864, being An act to provide for the construction of a wagon road from Fort Wilkins,

in the State of Michigan, to Fort Howard, in the State of Wisconsin, together with all the rights and equity of the said mortgagor corporation in and to the rest and residue of the said two hundred thousand acres, and all the rights, benefits, and equities of redemption of the said The Lake Superior Ship Canal, Railroad and Iron Company and of George Jerome and Fernando C. Beaman, assignees in bankruptcy of the said company, in all the said ship canal, corporate franchises, said four hundred thousand acres of canal-grant
122 lands, and said two hundred thousand acres of wagon-road lands under the incumbrances declared to be existing valid liens thereon in and by this decree.

Thirty-third. And it is further ordered, adjudged, and decreed that the complainants in the several bills of foreclosure aforesaid do reserve their costs respectively, to be taxed, but not as against said assignees.

Thirty-fourth. And it is further ordered that any of the parties in any of the said above-entitled causes, or who may be interested in any of the said various issues of bonds, or any parties who may acquire the title to any of said mortgaged property, may apply to the court upon the footing of this decree for any order or relief which may be necessary or proper in the premises.

EXHIBIT G.

Whereas J. C. Ayer & Co., J. Boorman Johnston & Co., Theodore M. Davis, as receiver of the Ocean National Bank, James C. Ayer, and George C. Richardson, being the principal creditors and holding certain bonds and other obligations of the Lake Superior Ship Canal, Railroad and Iron Company, which said bonds and obligations are particularly specified in the articles of agreement hereinafter referred to and are secured by mortgages and other liens upon the property of said corporation in process of foreclosure, on the 24th day of September, A. D. eighteen hundred and seventy-five, made and entered into, as parties of the first part, certain articles of agreement in writing of that date with Don M. Dickinson, acting in behalf and as representative of parties holding a majority of the stock of said corporation, as party of the second part, whereby said parties of the first part, for the purpose of enabling said Dickinson to perfect the title to and effect a sale of said property to certain
123 English capitalists, in pursuance of a contract existing between said Dickinson and the representatives of said English capitalists, did agree to sell and transfer unto said Dickinson the bonds and obligations aforesaid upon the payments of certain sums of money within certain times and on certain conditions in said articles specified and set forth;

And whereas unexpected delays have occurred in the consummation of said sale to said English capitalists, in consequence whereof the said Dickinson has been unable to make said payments and perform said conditions within the times therefor specified in said articles of agreement and any agreements supplementary thereto or in extension thereof heretofore made by or between said parties;

And whereas since the making of the agreements aforesaid certain decrees have been made by courts of the United States having jurisdiction in the premises for the sale of said property of said corporation under said mortgages and liens or some of them and in foreclosure thereof whereby satisfactory title to said property may be obtained, and it is desired that the time for payment of said moneys may be extended, and the purpose and interest of said articles may yet be effected, and the respective interests of said parties in said property may be properly and reasonably protected;

And whereas, in consequence of the decrees aforesaid and the changes in the conditions and relations of said parties and other changes which have occurred since the making of said articles of agreement, it has become desirable and necessary not only that the time for which the performance of the conditions of said articles of agreement shall be extended, but that said articles should in other respects be essentially modified and altered:

Now, therefore, this indenture, made in place and substitution of and for said articles of agreement and all other agreements in extension thereof or supplementary thereto this ninth day of April, in the year of our Lord eighteen hundred and seventy-seven, by and between—

124 (A.) Frederick J. Ayer, in the capacity of guardian, duly appointed by the judge of probate in and for the county of Middlesex, in the Commonwealth of Massachusetts, of said James C. Ayer (now an insane person);

(B.) Frederick Ayer, of Lowell, in said county;

(C.) Albert G. Cook, of said Lowell;

(D.) George C. Richardson, of the city of Boston;

(E.) J. Boorman Johnston & Co., of the city of New York, and

(F.) Theodore M. Davis, of said New York, as receiver of the Ocean National Bank, as parties of the first part, and Don M. Dickinson, of the city of Detroit, as party of the second part, and Albon P. Man, of said New York, and Nathaniel Wilson, of the city of Washington, as parties of the third part, witnesseth:

That the parties of the first part and the owners and holders of the bonds, certificates, stocks, and other obligations and securities in the several schedules hereto annexed and specified, to wit, the said James C. Ayer and said Frederick Ayer, of the bonds, certificates, and securities described and specified in the schedule hereto annexed marked "B" and subscribed by said guardian and said Frederick Ayer; the said Albert G. Cook, of the certificate mentioned in the schedule hereto annexed marked "C" and subscribed by him; the said Richardson, of the bonds specified in the schedule hereto annexed marked "D" and subscribed by him; the said J. Boorman Johnston & Co., of the bonds, certificates, and stock and securities specified in the schedule hereto annexed marked "E" and subscribed by them, and the said Theodore M. Davis, as receiver of said bank, of the bonds and stocks and other securities described and specified in the schedule hereto annexed marked "F" and subscribed by him.

125 And the said several parties of the first part, each of them

for himself (and not jointly or one for another), do hereby agree unto and with the said party of the second part, and each unto and with the other of said parties of the first part, that they severally will without unreasonable delay deliver unto and deposit with the said Man and Wilson, parties of the third part, their said respective bonds, certificates, stocks, and other securities in said schedules specified in and upon the trusts and for the uses hereinafter set forth; and said Man and Wilson are hereby made and constituted trustees under this indenture for the purposes following, to wit:

Said trustees shall take the custody of said bonds, certificates, stocks, and other securities for the purposes and uses herein set forth. They shall attend any sale or sales of the property of said corporation made under any decree or decrees of any court of the United States in the process of foreclosure, and purchase the franchise and the following-described property of said corporation, to wit:

1st. The canal formerly known as the canal of the Portage Lake and Lake Superior Ship Canal Company.

2d. Two hundred thousand acres of land in Michigan granted by act of Congress of the United States to aid in the construction of said canal by act approved March 3d, 1865, and conferred upon said company by act of the Legislature of the State of Michigan by act approved March 18, 1865.

3d. Two hundred thousand acres of land granted to said company to aid in the construction of said canal by act of Congress approved July 3, 1866.

4th. Forty-seven thousand nine hundred and fifty-eight $\frac{85}{100}$
126 acres of the land known as the wagon-road lands, which were acquired from the State of Michigan by one Francis W. Anthony; also all other property and rights in property of said Lake Superior Ship Canal, Railroad and Iron Company, if any, that may be offered for sale under any such decree as aforesaid.

Provided said trustees can thereby secure and obtain such absolute and perfect title thereto as may be satisfactory to them; and said trustees are hereby expressly authorized to bid for said property such sum or sums as they, by agreement of same date herewith, signed by said parties hereto, are directed to do.

Upon the purchase of said property by said trustees, and the sale thereof having been confirmed by the court ordering the same, said trustees shall associate with themselves as corporators for the purpose of forming a corporation under the act of law of the State of Michigan entitled "An act to amend chapter 130, Compiled Laws of 1871, under the general provisions relating to corporations, by adding a new section thereto relating to mortgages of franchises," approved March 29, 1872, Gordon Norrie, Schuyler F. Seager, Theodore M. Davis, George W. Debevoise, and Don M. Dickinson, or in the event of the decease or declination of any of said persons above named as associates the vacancy so occasioned shall be filled by appointment by said trustees, said associates with said trustees, by instrument in writing signed by each of them, declaring and

covenanting unto the other parties to this indenture that they, as such corporators as aforesaid, will act and will hold said franchises and all property that shall be vested in said corporation so established only in and upon the trusts and for the purposes in this indenture and said agreement of same date herewith set forth, which instrument shall be deposited with said Albon P. Man for the benefit of all the parties herein interested; and said Man and Wilson and their said associates shall duly make articles of association and file the same, together with a copy of the order of court confirm-
127 ing said sale of said property, in the office of the secretary of state of Michigan, and do all such other acts and things as are necessary or required by the provisions of said act of law or the general laws of Michigan to organize and constitue a corporation under the name of the Lake Superior Ship Canal, Railway and Iron Company, for the purpose and with the powers of holding and succeeding to the franchises and property of said first-named corporation.

The capital stock of said corporation so to be established shall be affixed at not exceeding eight million dollars and shall be divided into shares of one hundred dollars each. The said trustees and their said associates shall elect or appoint themselves a board of directors of said corporation, and thereupon said Man and Wilson shall, by deed or deeds in due form of law, convey unto said corporation so to be established as aforesaid all the franchises, property, and rights and title in any property that shall have been purchased and acquired by them as aforesaid.

Upon the completion of the organization of said corporation so to be established as aforesaid and the conveyance to it of said franchises, property, rights, and title said Man and Wilson and their said associates shall, as directors as aforesaid, as soon as they can legally so do, cause to be issued by and in the name of said corporation and to be delivered unto said Man and Wilson certificates of stock, in usual form, certifying that said Man and Wilson, as trustees under this indenture, are the proprietors of such number of shares in the capital stock as in the aggregate shall be equal to the whole number of shares in said capital as above specified, and shall also cause to be issued and delivered to said Man and Wilson bonds of said corporation to the amount of not exceeding four million dollars, payable to the bearer in such time or times and with interest at such rate and payable at such times and places as said party of the second part shall designate. The denominations of said certificates and bonds and the particular forms thereof shall be
128 determined by said trustees. Said Man and Wilson and their said associates, as such directors as aforesaid, shall also cause to be made and duly executed, acknowledged, and delivered the deed of trust of said corporation, in such form as said party of the second part shall determine, conveying unto such trustee as said Man and Wilson shall nominate all its property as security for the payment of such bonds so to be issued as aforesaid.

Upon payment unto said Man and Wilson of the sum of eighteen hundred eighty-six thousand two hundred and fifty-one dollars

and forty cents ($1,886,251.40) by said Don M. Dickinson, his personal representatives or assigns, on or before the first day of July now next ensuing, said Man and Wilson shall deliver unto said Dickinson, his personal representatives or assigns, all said bonds of said corporation and all said certificates of stock to be issued as aforesaid, with due transfers thereof, and also all the said bonds, certificates, stocks, and securities mentioned and described in said schedules hereto annexed (if any) which shall not have been used or appropriated by said Man and Wilson in the purchase of or payment for said property to be purchased by them as aforesaid; all such shares, bonds, certificates, stocks, and securities so to be delivered and transferred to said Dickinson, his representatives or assigns, to be for his or their use, behoof, and disposal.

In the event of the payment of said sum of one million eight hundred and eighty-six thousand two hundred and fifty-one $\frac{40}{100}$ dollars by said Dickinson, his representatives or assigns, as aforesaid, said Man and Wilson shall appropriate, pay, distribute, and dispose of the same as follows, to wit:

First. To the payment of the expenses and charges of said sale and purchase of said property, the establishment of said corporation, and the execution by said Man and Wilson and their said associates of the trusts hereby created.

129 Second. To the repayment of any moneys by said trustees procured or advanced and used in the purchase of and payment for said property, to the extent authorized and limited by said agreement of even date herewith.

Third. To the payment to the said parties to this indenture of the first part, respectively, of the sums following, to wit: To said James C. Ayer, his personal representatives or assigns, the sum of three hundred nineteen thousand nine hundred twenty-one dollars and twenty-three cents ($319,921.23).

To the said Frederick Ayer, his personal representatives or assigns, the sum of one hundred and fifty-nine thousand nine hundred sixty dollars and sixty-one cents ($159,960.61).

To said Albert G. Cook, his personal representatives or assigns, the sum of eighteen thousand four hundred and thirty-three dollars and thirty-three cents ($18,433.33).

To said George C. Richardson, his personal representatives or assigns, the sum of one hundred thirteen thousand one hundred sixty-seven dollars and thirty-nine cents ($113,167.39).

To said J. Boorman Johnston & Co., their personal representatives or assigns, the sum of four hundred thirty-six thousand eight hundred thirty-nine dollars and eighteen cents ($436,829.18).

To said Theodore M. Davis, as receiver as aforesaid, or his successor in said office or assigns, the sum of two hundred and fifty thousand dollars ($250,000).

Fourth. The balance, if any, remaining after the payments aforesaid shall be paid to and retained by said Nathaniel Wilson, his personal representatives or assigns, discharged from this trust, and shall be held, used, and disposed of by him or them without accounta-

bility therefor to the parties aforesaid or any of them by reason of anything herein.

It is further understood and agreed by and between the
130 parties to this indenture that the time hereinabove mentioned for the said payment by the said Dickinson, his representatives or assigns, is of the essence of and a material stipulation and condition of this indenture.

Nevertheless, in order to provide for unexpected delays in the purchase of said property, it is hereby further agreed by and between the parties hereto that in the event that on or before said first day of July no sale of said property shall have been effected and said Dickinson, his personal representatives or assigns, shall have deposited or caused to be deposited with Drexel, Morgan & Co. or Baring Brothers the sum of five hundred thousand dollars on account of said purchase, and with authority to pay the same to said trustees upon the execution of this trust, then the time for the performance of this trust and agreement shall be extended for not exceeding sixty days or such time as said deposit shall so remain with said bankers; and in the event that at the expiration of such extension no sale of said property shall have been effected and said Dickinson, his personal representatives or assigns, shall have deposited or caused to be deposited with said Drexel, Morgan & Co. or Baring Brothers as aforesaid the sum of one million eight hundred and eighty-six thousand two hundred fifty-one $\frac{40}{100}$ dollars, then the time for the performance of said trust and this contract shall be further extended until a sale of said property shall have been made and confirmed by the court ordering the same, but not longer than said last-named sum shall remain on deposit with said bankers as aforesaid.

In the event that said Dickinson, his personal representatives and assigns, shall neglect to pay said sum of eighteen hundred eighty-six thousand two hundred and fifty-one $\frac{40}{100}$ dollars on or before the first day of July or at the expiration of any extension thereof hereinbefore provided, then said trustees shall dispose of said share in said bonds of said corporation to be established as aforesaid in the manner agreed and provided in and by the said agreement of same date herewith.

131 Neither of the parties to this indenture shall, by reason of anything herein, be personally liable for or on account of any moneys procured, advanced, or used by said trustees in the purchase of said property, nor for any expense or charges for the execution of the trust herein created.

In the event of the decease of either said Albon P. Man or Nathaniel Wilson before the trust herein created shall have been fully executed the survivor of them shall have and perform all the powers, duties, — trusts hereinabove conferred upon the two.

And the said parties of the third part do hereby accept the trust hereinbefore conferred upon them and agree (each for himself) unto and with said parties of the first part and second part and each and every of them that they will execute and perform said trusts, according to the intent thereof.

In witness whereof the said parties of this indenture have hereunto set their hands this day and year first above written.

FRED'K F. AYER.
As Guardian of James C. Ayer.
GEO. C. RICHARDSON.
FREDERICK AYER.
ALBERT G. COOK.
J. BOORMAN JOHNSTON & CO.,
In Liqu'n.
DON M. DICKINSON.
THEODORE M. DAVIS,
As Receiver of the Ocean National Bank of the City of New York.
ALBON P. MANN.
NATHANIEL WILSON.

132 SCHEDULES ABOVE REFERRED TO.

SCHEDULE "B."

236 receiver's certificates of the first issue.
46 receiver's certificates of the second issue.
3 bonds of the L. S. S. C., R. & I. Co., secured by the Sutherland or Birdseye mortgage, so called.
55 bonds of the same corporation, secured by the McCarter mortgage, so called.
17 bonds of the same corporation, secured by the Union Trust Company mortgage, so called; all coupons attached to said bonds.
Note of said corporation for $210,000, dated February 14, 1871.
Note of said corporation for $75,000, dated December 10, 1870.
Note of W. L. Avery for $9,738, dated January 4, 1871.
Note of said Avery for $15,000, dated June 17, 1871.

FREDERICK F. AYER,
As Guardian of James C. Ayer.
FREDERICK AYER.

SCHEDULE "C."

14 receiver's certificates of the first issue.

ALBERT G. COOK.

SCHEDULE "D."

354 bonds of said corporation, secured by the Sutherland mortgage, so called.
134 bonds of said corporation, secured by the Birdseye mortgage, so called.
251 bonds of said corporation, secured by the McCarter mortgage, so called.
All unpaid coupons attached to said bonds.

GEO. C. RICHARDSON.

133 SCHEDULE "E."

250 receiver's certificates, first issue.
100 bonds of said corporation, secured by the Birdseye mortgage, so called.
7 bonds of said corporation, secured by the Sutherland mortgage, so called.
109 bonds of said corporation, secured by the McCarter mortgage, so called.
58 bonds of said corporation, secured by the Union Trust Company mortgage, so called.
50 shares in the capital stock of said corporation (at par value thereof) of fifty thousand dollars.
79 receiver's certificates, second issue.
$75 Birdseye bonds.
$10,500 Birdseye bonds.
All unpaid coupons attached to said bonds.
Also the contract of said corporation for eighty thousand dollars.

JAS. BOORMAN JOHNSTON & CO., *In Liqu.*

SCHEDULE "F."

119 bonds of said corporation, secured by the Sutherland mortgage, so called.
52 bonds of said corporation, secured by the Birdseye mortgage, so called.
268 bonds of said corporation, secured by the McCarter mortgage, so called.
336 bonds of said corporation, secured by the Union Trust Company mortgage, so called.
550 shares in the capital stock of said corporation.
8,775 coupons and all unpaid interest coupons attached to said bonds.
Also the following-named evidences of debt and securities:

134		Amount.	Birdseye.	Frost.	U. T.	
1871.						
July 1	Wm. L. Avery	$18,850 00 loan				Note of A. Wild for $18,850, end. P. J. & W. L. Avery.
Aug. 31	do.	4,700 00 do.		$25,000 00	$22,000 00	Ch'k on W. L. A. on Ocean Bank.
Sept. 13	do.	2,000 00 do.				Do. do.
" 18	do. overdraft	452 34 overd'ft				
Aug. 24	P. J. Avery	18,000 00 loan	$8,000 00		56,000 00	5,000 (sh's stock). Note of A. Wild for $18,000, endorsed J. E. C. & Co., P. J. & W. L. A.
Sept. 27	do.	967 69 overd'ft			6,000 00	
May 17	J. E. Conant & Co.	10,000 00 loan			2,000 00	Note of J. E. C. & Co. for $10,000, end. P. J. & W. L. A. & A. W.
June 13	do.	10,000 00 do.				Note of J. E. C. & Co. for $10,000, end. P. J. & W. L. A. & A. W.
June 24	do.	11,500 00 do.				Note of J. E. C. & Co. for $11,500, endorsed P. J. & W. L. A. & A. W.
Oct. 14	do.	273 52				
May 23	Alfred Wild	22,000 00				Note of J. E. C. & Co. for $22,000, endorsed P. J. & W. L. A. & A. W.
Sept. 19	do.	3,430 60		26,000 00		Note of A. Wild, $3,430.60, endorsed P. J. & W. L. A. & A. W. & J. E. C. & Co.
Oct. 23	do.	29,460 99			48,000 00	Note of A. Wild, endorsed P. J. & W. L. A. & A. W. & J. E. C. & Co.
Nov. 7	Alfred Wild, treas.	10,103 06 note	25,000 00			Note — A. Wild, $3,430.60, end. C. Callendar & J. E. C. & Co.
" 13	do.	10,122 50 do.	25,000 00			5,000 (st'k) Note A. Wild, end. C. Callendar & J. E. C. & Co.
Sept. 29	do.	5,073 34 c'k on R'b			10,000 00	Check on Rhinebeck.
135						
" 18	do.	71,265 83 note				Co. note for, endorsed by P. J. & W. L. Avery, J. E. C. & Co. & A. W.
Nov. 4	do.	5,874 56 do.				

		Amount.	Birdseye.	Frost.	U. M.	
1872.	Alfred Wild, treas.	$37,589 75 note		$147,000 00		Note for, endorsed P. J. & W. L. A., J. E. C. & Co. & A. W.
Feb. 16	do.	426 67 overd'ft		70,000 00		
" 16	do.	4,000 00 ch'k coup.	2,500 00			Endorsed by P. J. & W. L. A., J. E. C. & Co. & A. W.
Ap'l 27	Chs. Callendar	25,000 00			30,000 00	100,000 (P. L. stock). C. C. check on Ocean Bank.
						Do. do. do.
Aug. 11	do.	6,000 00			30,000 00	Check, Shoe & Leather Bank.
" 16	do.	16,000 00			25,000 00	" Central Nat'l Bank.
Sept. 29	do.	5,000 00			41,000 00	" Third " "
Oct. 2	do.	35,000 00			10,000 00	" Union Square "
" 6	do.	20,000 00				
" 7	do.					
Dec. 6	do.	940 09				

136 The following notes are held as collateral to above indebtedness:

Note A. Wild, $5,000, end. P. J. & W. L. Avery.
" " 5,000, " P. J. & J. E. C. & Co.
" " 15,000, " J. E. Conant & Co., P. J. Avery, & Chas. Callendar.
Note A. Wild, $10,000, end. J. E. Conant & Co., P. J. Avery, & Chas. Callendar.
Note A. Wild, $10,000, end. J. E. Conant & Co., P. J. Avery, & Chas. Callendar.
Note Canal Company, $10,000, end. A. Wild, D. R. Martin, P. J. & W. L. Avery, & Chas. Calendar.
Note W. L. Avery, $20,000, end. A. Wild.

Also any other evidence of debt or paper of the parties named in annexed schedule or any of them held by the Ocean National Bank or its receiver.

THEO. M. DAVIS,
As Receiver of the Ocean Nat. Bank of the City of New York.

EXHIBIT H.

Whereas, by indenture made simultaneously herewith by and between (*a*) Frederick F. Ayer, as guardian of J. C. Ayer, (*b*) Frederick Ayer, (*c*) Albert G. Cook, (*d*) George C. Richardson, (*e*) J. Boorman Johnston & Co. (*f*) Theodore M. Davis, as receiver of the Ocean National Bank, as parties of the first part, and Don M. Dickinson, as party of the second part, and Albon P. Man and Nathaniel Wilson, as parties of the third part, said parties did enter into an agreement for the purchase of certain property, franchises, and interests formerly of the Lake Superior Ship Canal, Railroad, and Iron Company, and the organization of a new corporation and conveyance thereto of said property and the issue of shares of the capital stock of said corporation, and also certain bonds of said corporation, and, upon certain conditions in said indenture
137 set forth, the transfer and delivery of said shares and bonds to said Dickinson, his personal representatives or assigns;

And whereas the said parties desire to further provide for the disposition of said shares and bonds in the event that the condition aforesaid shall not be performed by said Dickinson, his personal representatives or assigns, and also to make certain other agreements and promises relating to the purchase and disposition of said property:

Now, it is hereby agreed by and between the parties aforesaid that said Man and Wilson are authorized to and shall bid or expend in the purchase of said property such sum of money not exceeding one million dollars as they shall find necessary to procure a satisfactory title to said property, and for that purpose said Man and Wilson may and, as far as they can, shall use the certificates mentioned in the schedules annexed to said indenture, but they shall not expend any sum exceeding fifty thousand dollars in addition to the amount for which said certificates shall be available in said purchase.

And it is hereby further agreed by said parties that in the event that said Don M. Dickinson, his representatives and assigns, shall neglect to pay unto said Man and Wilson the said sum of one million eight hundred and eighty-six thousand two hundred and fifty-one dollars and forty cents on or before said first day of July now next ensuing, then said Man and Wilson shall cancel all said bonds and cause said trust deed to be cancelled and title thereby conveyed to be released and discharged unto said corporation, and shall deliver, transfer, and dispose of said certificates and shares of stock so to be issued as aforesaid as follows, to wit:

To said Don M. Dickinson, his personal representatives or assigns, one-tenth of said shares in said capital stock.

Said trustees shall sell at public auction, in the city of New York, upon ten days' notice to each of the parties hereto, so many
138 of the residue of said shares as shall be necessary for the purpose, and out of the proceeds thereof repay such sums of money as they may have expended under the provisions of this agreement and said indenture of even date herewith, in excess of the amount that shall be allowed or realized by them for or on account of said certificates and other securities mentioned in the schedules annexed to said indenture.

And the shares remaining after such sale and the deduction of said one-tenth to said Dickinson shall be by said trustees delivered and transferred as follows, to wit:

To said James C. Ayer, his personal representatives or assigns, the same proportion of said shares remaining as aforesaid which the sum of three hundred nineteen thousand nine hundred twenty-one dollars and twenty-three cents ($319,921.23) is of one million six hundred ninety-three thousand three hundred eleven dollars and seventy-four cents ($1,693,311.74).

To said Frederick Ayer, his personal representatives or assigns, the same proportion of said shares remaining as aforesaid which the sum of one hundred fifty-nine thousand nine hundred sixty dollars and sixty-one cents ($159,960.61) is of one million six hundred ninety-three thousand three hundred and eleven dollars and seventy-four cents ($1,693,311.74).

To said Albert G. Cook, his personal representatives or assigns, the same proportion of said shares remaining as aforesaid which the sum of eighteen thousand four hundred thirty-three dollars and thirty-three cents ($18,433.33) is of one million six hundred ninety-three thousand three hundred eleven dollars and seventy-four cents ($1,693,311.74).

To said George C. Richardson, his personal representatives or assigns, the same proportion of said shares remaining as aforesaid which the sum of one hundred thirteen thousand one hundred sixty-seven dollars and thirty-nine cents ($113,167.39) is of one million six hundred ninety-three thousand three hundred eleven dollars and seventy-four cents ($1,693,311.74).

139 To said J. Boorman Johnston & Co., their personal representatives or assigns, the same proportion of said shares remaining as aforesaid which the sum of four hundred thirty-six

thousand eight hundred twenty-nine dollars and eighteen cents ($436,829.18) is of one million six hundred ninety-three thousand three hundred eleven dollars and seventy-four cents ($1,693,311.74).

To said Theodore M. Davis, as receiver of the Ocean National Bank, or his successor in said office or assigns, the same proportion of said shares remaining as aforesaid which the sum of two hundred fifty thousand dollars is of one million six hundred ninety-three thousand three hundred eleven dollars and seventy-four cents ($1,693,311.74).

To the said Nathaniel Wilson, his personal representatives or assigns, the same proportion of said shares remaining as aforesaid which the sum of three hundred and ninety-five thousand dollars is of one million six hundred ninety-three thousand three hundred eleven dollars and seventy-four cents ($1,693,311.74).

And it is hereby further agreed that if at any sale or attempted sale of said property any sum shall be bid or offered therefor by any person other than a party to this agreement exceeding the amount which said Man and Wilson are hereby authorized to pay or shall actually bid for said property, then either or any of the parties hereto, other than said Man and Wilson, may bid for and purchase said property or any part thereof for his or their own account and use and without accountability therefor to the other parties hereto or any or either of them.

But in the event that at any sale or offer of sale of said property any or either of the parties hereto, other than said Man and Wilson, shall be the highest bidder therefor, such party or parties shall make no objection to the postponement of such sale, at the request of either of the other parties hereto, at any time before the sale shall be consummated or said property struck off.

140 And whereas J. C. Ayer claims to be the owner of the absolute and indefeasible title, in fee simple, of all the wagon-road lands, "so called," mentioned in said indenture, except the forty-seven thousand nine hundred fifty-eight $\frac{85}{100}$ acres therein mentioned, but by a certain decree of the circuit court of the United States for the eastern district of Michigan it is ordered that said forty-seven thousand nine hundred fifty-eight $\frac{85}{100}$ acres of wagon-road lands, together with all the equity of redemption or other right or interest of said first-named corporation in the residue of said wagon-road lands, be sold by the master in chancery in said decree mentioned, and it is deemed desirable that all claim or color of right in said residue of said wagon-road lands adversely to said J. C. Ayer shall be quieted and extinguished:

Now, it is further agreed by said parties hereto that in the event of the purchase of said property by said Man and Wilson or the survivor of them and the failure of said Dickinson, his personal representatives and assigns, to pay to said Man and Wilson said sum of one million eight hundred and eighty-six thousand two hundred and fifty-one $\frac{40}{100}$ dollars within the time specified and limited therefor in said indenture, said Man and Wilson and their said associate corporators shall and will cause to be duly conveyed unto said J. C. Ayer, his heirs or assigns, all the right, title, and estate in

said residue of said wagon-road lands that shall be purchased or acquired by said Man and Wilson or the survivor of them as aforesaid.

And the said Wilson, in consideration of the interests secured to him by the said indenture and this agreement, doth hereby agree unto and with the said parties of the first part and each of them that in the event of the purchase of said property by said trustees, Man and Wilson, or the survivor of them, he will indemnify said parties of the first part and each of them against and will pay all the charges and expenses of said trustees (Man and Wilson)
141 and their said associates for and in and about the execution of their said trusts; all lawful charges of trustees under the mortgages in foreclosure whereof said property shall be sold; the taxable costs in the suits and proceedings for foreclosure of said mortgages; the charges of the master or masters in chancery or other officers in or for the sale of said property; all claims or demands of Alfred Russell remaining unpaid for services and expenses in said suits or proceedings and for any portion or interest in said property or any shares in the capital stock of said proposed corporation.

Neither of said parties of the first or second parts shall, by reason of anything herein, be personally liable for or on account of any moneys procured, advanced, or used by said trustees in the purchase of said property, nor for any expenses or charges in or for the execution of the trust herein created.

Witness our hands this ninth day of April, 1877.

(Signed) FRED. F. AYER,
As Guardian of James C. Ayer.
FREDERICK AYER,
ALBERT G. COOK,
GEO. C. RICHARDSON,
J. BOORMAN JOHNSTON & Co., *in Liqu'n.*
THEO. M. DAVIS,
As Receiver of the Ocean Nat. Bank of the City of New York.
DON M. DICKINSON.
ALBON P. MAN.
NATHANIEL WILSON.

142 Supreme Court, Kings County.

ANDREW W. KENT, as Executor and Trustee under the Last Will and Testament of Jonathan Tremaine Wells, Deceased,

against

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY, Theodore M. Davis, and Theodore M. Davis as Receiver of the Ocean National Bank of New York; J. Boorman Johnston, Isaac H. Knox, and Gordon Narrie, Being the Surviving Partners of the Firm of J. Boorman Johnston & Company; Frederick Ayer, Sole Surviving Partner of the Firm of J. C. Ayer & Company; Frederick F. Ayer, Josephine Ayer, and Benjamin Dean, Administrators, with Will Annexed, of the Estate of James C. Ayer, Deceased, and Thomas N. McCarter.

To the honorable the supreme court of the State of New York for the second judicial district:

The petition of the Lake Superior Ship Canal, Railway and Iron Company respectfully shows to the court:

I. Your petitioner is, with the other defendants above named, a party defendant in the above-entitled action. It was commenced against your petitioner on the 15th day of February, 1884,
143 and is now pending against it in this court, in the county of Kings, in the second judicial district.

II. The plaintiff at the time of bringing the suit was and he still is a citizen and a resident of the State of New York.

Your petitioner was at the time of the commencement of the suit and still is a corporation created and existing by and under the laws of the State of Michigan and a citizen of and a resident of that State. It carries on its operations in that State and its property is situated there.

The defendants, Theodore M. Davis, Isaac H. Knox, Frederick Ayer, Benjamin Dean, and Thomas N. McCarter, are all citizens and residents of States other than the State of New York; the defendant, Theodore M. Davis, being a citizen and resident of the State of Rhode Island; the defendant, Isaac H. Knox, being a citizen and resident of the State of Missouri; the defendants, Frederick Ayer and Benjamin Dean, being citizens and residents of the State of Massachusetts, and the defendant, Thomas N. McCarter, being a resident of the State of New Jersey.

144 III. In the suit there is a controversy between the plaintiff and your petitioner, which can be fully determined as between the plaintiff and your petitioner without the presence of the other defendants as parties in the cause; that controversy is wholly between your petitioner and the plaintiff. It can be fully determined as between them. They are citizens of different States. So far as the action relates to this defendant, it is brought, among other things, for the purpose of enjoining and restraining it from transferring upon the books any of the stock held by the defendants or any of them, and from selling, encumbering, or transferring any of the property held by it and described in the complaint in the action;

for all of which causes your petitioner is advised and believes it had the right to have the suit as against it removed into the circuit court of the United States.

IV. The purpose of the action, so far as relates to the claim in the complaint against your petitioner, is to have it adjudged that it account to the plaintiff for any profit which it may have made by reason of certain proceedings in the complaint set forth, and there asserted to have been in fraud of Jonathan Tremaine Wells,
145 of whom the plaintiff alleges that he is executor and trustee under his will; and, further, that your petitioner may be adjudged to pay to the plaintiff whatever sums of money may be found upon such accounting to be owing to the plaintiff from it, and that it may be adjudged to pay to the plaintiff $80,000, with interest, as damages.

V. The plaintiff, by his complaint, further asks that a certain decree of the circuit court of the United States, held in and for the eastern district of Michigan, may in certain particulars be set aside, and that certain sales of property and the deeds thereof, including a deed to your petitioner, may be declared to be in trust for the said Wells, and that the plaintiff may be declared to succeed to the alleged rights of the said Wells in the premises, so far as concerns a parcel of 8,000 acres of land, in which the plaintiff alleges that the said Wells was interested, and that your petitioner may be enjoined and restrained as hereinbefore mentioned.

VI. The matter in dispute in this action, as between the plaintiff and your petitioner, exceeds the sum of $500, exclusive of costs.

146 This action has not yet been reached for trial. Your petitioner has appeared and demurred to the plaintiff's complaint. The action is now pending for trial upon said demurrer as against your petitioner, and the first term of the supreme court at which it would be tried is appointed to be held in and for the county of Kings, on the first Monday of June, 1884.

VII. As your petitioner is informed and believes, no other defendant has demurred in this action. Some of the defendants have answered.

Your petitioner is desirous of removing this suit, as between it and the plaintiff, before the trial thereof, into the next circuit court of the United States, to be held in the eastern district of New York, in the second circuit, in pursuance of the provisions of law as contained in subdivision second of section 639 of the Revised Statutes of the United States, and in the act of Congress approved March 3, 1875, entitled "An act to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," and of any other statute in such case made and provided.

147 Your petitioner therefore offers herewith its bond, with Gordon Narrie and Frederick F. Thompson as sureties, in the penal sum of $2,000, conditioned as by said provisions of law required; and your petitioner prays that the said bond may be accepted as good and sufficient, according to the provisions of the said Re-

vised Statutes and of the said act of Congress, and that the said action as against your petitioner may be removed into the next circuit court of the United States to be held in and for the eastern district of New York, pursuant to the acts of Congress in such case made and provided, and that this honorable court may proceed no further herein except to make the order of removal required by said court to accept such petition and bond and to cause the record herein to be removed into said circuit court of the United States in and for the eastern district of New York.

And your petitioner, as in duty bound, will ever pray, &c.

Dated New York, May tenth, 1884.

THE LAKE SUPERIOR SHIP CANAL,
RAILWAY AND IRON COMPANY,
By G. NARRIE, *Vice-President.*

MAN & PARSONS,
Pet'r's Att'ys, 56 Wall Street, N. Y.

148 CITY AND COUNTY OF NEW YORK, *ss:*

Gordon Narrie, being sworn, says: I am the vice-president of the above-named defendant, The Lake Superior Ship Canal, Railway and Iron Company, and petitioner in the foregoing petition. I have read the petition and know the contents thereof. The same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

G. NARRIE.

Sworn to before me this 12th day of May, 1884.

[L. S.] JNO. J. LOUTH,
Kings County, N. Y.

149 United States Circuit Court, Eastern District of New York.

ANDREW W. KENT, as Executor, &c.,
vs.
THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY and Others.

MAY 26, 1884.

This cause having been originally commenced in the supreme court of the State of New York in and for the county of Kings, and having been duly removed into this court upon the application of the defendant, The Lake Superior Ship Canal, Railway and Iron Company, and the said defendant having this day duly filed a copy of the record in this cause, and having duly appeared, now, on motion of John E. Parsons, Esq., solicitor for said defendant, it is—

Ordered, That this cause do proceed in this court in the same manner as if it had been originaliy brought therein.

150 At a stated term of the circuit court of the United States

for the eastern district of New York, held at the court-house, in the city of Brooklyn, on the 26th day of May, 1884.

Present: Hon. Chas. L. Benedict, district judge, holding the circuit court.

ANDREW W. KENT, as Executor and Trustee under the Last Will and Testament of Jonathan Tremaine Wells, Deceased,

against

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY and O'rs.

Upon reading and filing the annexed consent it is ordered that John E. Parsons be, and he hereby is, substituted as attorney for the defendants, The Lake Superior Ship Canal, Railway and Iron Co., Theodore M. Davis, Theodore M. Davis as receiver, in the place and stead of Man & Parsons.

(Signed) CHAS. L. BENEDICT.

151 United States Circuit Court, Eastern District of New York.

ANDREW W. KENT, as Executor and Trustee under the Last Will and Testament of Jonathan Tremaine Wells, Deceased,

against

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY and Others.

We hereby consent that John E. Parsons be substituted for us as attorney for the defendants, The Lake Superior Ship Canal, Railway and Iron Co., Theodore M. Davis, Theodore M. Davis as receiver, in the above-entitled action.

Dated New York, May 20, 1884.

MAN & PARSONS.

Endorsed: Consent and order of substitution. Filed and entered this 26th day of May, 1884.

152 U. S. Circuit Court, Eastern District of New York.

ANDREW W. KENT, as Executor, &c.,

vs.

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY and Others.

The defendant, The Lake Superior Ship Canal, Railway and Iron Company, by John E. Parsons, its attorney, demurs to the complaint of the plaintiff, in that the following objections thereto appear upon the face thereof:

1. That the court has not jurisdiction of the subject of the action.

2. That causes of action have been improperly united, in that the plaintiff asks judgment for eighty thousand dollars and interest, a claim at law for which the defendants are entitled to a jury trial

and also asks judgment for equitable relief, a claim in equity to be tried by the court.

153 3. That the complaint does not state facts sufficient to constitute a cause of action against this defendant.

This defendant asks that as to it the complaint may be dismissed with costs.

JOHN E. PARSONS,
Att'y for Def't, The Lake Superior Ship Canal, Railway and Iron Company.

Endorsed: Amended demurrer. Filed January 12, 1885.

154 At a stated term of the circuit court of the United States for the eastern district of New York, held at the United States court building, in the city of Brooklyn, on the ninth day of May, 1887.

Present: Hon. Charles L. Benedict, district judge, holding the court.

ANDREW W. KENT, as Executor and Trustee under the Last Will and Testament of Jonathan Tremaine Wells, Deceased,
vs.
THE LAKE SUPERIOR SHIP CANAL AND IRON COMPANY *et al.*
} In Equity.

Upon reading and filing the stipulation herein dated the 5th day May, 1887, and on motion of John E. Parsons, the attorney for the defendants hereinafter named—

It is ordered that the defendants, Frederick F. Ayer, as administrator, with will annexed, of the estate of James C. Ayer, deceased; Gordon Narrie, and Theodore M. Davis, both individually and as receiver of the Ocean National Bank of New York, have

155 leave severally to withdraw the answers heretofore put in by them and put in in lieu thereof demurrers similar to that already interposed by the defendant, The Lake Superior Ship Canal, Railway and Iron Company.

(Signed) CHAS. L. BENEDICT.

Endorsed: Order. Filed and entered May 9, 1887.

156 Circuit Court of the United States for the Eastern District of New York. In Equity.

ANDREW W. KENT, as Executor and Trustee under the Last Will and Testament of Jonathan Tremaine Wells, Deceased,
vs.
THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY *et al.*

The defendant, The Lake Superior Ship Canal, Railway and Iron Company, having put in a demurrer, and the said defendants, F. F. Ayer, as administrator, &c.; Gordon Narrie, and Theodore M. Davis, both individually and as receiver of the Ocean National Bank of

New York, having put in answers to the bill of complaint herein, it is hereby stipulated that the answers of the said defendants, Frederick F. Ayer, as administrator, &c., and Gordon Narrie and Theodore M. Davis, individually and as receiver as aforesaid, be withdrawn; that they put in demurrers similar to that interposed by the said company, which shall be submitted without
157 further argument to Judge Blatchford, to be decided by him upon the argument of the demurrer of the defendant, The Lake Superior Ship Canal, Railway and Iron Company.

Dated New York, May 5, 1887.

JOHN CUMMINS,
Att'y for Pl'ff.
JNO. E. PARSONS,
Att'y for Certain Defendants.

Endorsed: Stipulation. Filed and entered May 9, 1887.

158 U. S. Circuit Court, Eastern District of New York.

ANDREW W. KENT, as Executor, &c.,
vs.
THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY and O'rs.

The defendant, Gordon Narrie, by John E. Parsons, his attorney, demurs to the complaint of the plaintiff, in that the following objections thereto appear upon the face thereof:

1. That the court has not jurisdiction of the subject of the action.
2. That the causes of action have been improperly united, in that the plaintiff asks judgment for eighty thousand dollars and interest, a claim at law for which the defendants are entitled to a jury trial, and also asks judgment for equitable relief, a claim in equity to be tried by the court.
3. That the complaint does not state facts sufficient to constitute a cause of action against this defendant.

159 This defendant asks that as to him the complaint may be dismissed with costs.

JOHN E. PARSONS,
Att'y for Def't, Gordon Narrie.

Endorsed: Demurrer of def't, Gordon Narrie. Filed May 11th, 1887.

160 U. S. Circuit Court, Eastern District of New York.

ANDREW W. KENT, as Executor, &c.,
vs.
THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY and Others.

The defendant, Frederick F. Ayer, as administrator, with will annexed, of the estate of James C. Ayer, deceased, by John E. Parsons, his attorney, demurs to the complaint of the plaintiff, in that the following objections thereto appear upon the face thereof.

1. That the court has not jurisdiction of the subject of the action.
2. That the causes of action have been improperly united, in that the plaintiff asks judgment for eighty thousand dollars and interest, a claim at law for which the defendants are entitled to a jury trial, and also asks judgment for equitable relief, a claim in equity to be tried by the court.

3. That the complaint does not state facts sufficient to con-
161 stitute a cause of action against this defendant.

This defendant asks that as to him the complaint may be dismissed with costs.

JOHN E. PARSONS,
Att'y for Def't, Fred'k F. Ayer, as Administrator, with Will Annexed, of the Estate of James C. Ayer, Deceased.

Endorsed: Demurrer of def't, Frederick F. Ayer, as administrator, etc. Filed May 11th, 1887.

162 U. S. Circuit Court, Eastern District of New York.

ANDREW W. KENT, as Executor, &c.,
vs.
THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY and Others.

The defendant, Theodore M. Davis, individually and as receiver of the Ocean National Bank, by John E. Parsons, his attorney, demurs to the complaint of the plaintiff, in that the following objections thereto appear upon the face thereof:

1. That the court has not jurisdiction of the subject of the action.
2. That causes of action have been improperly united, in that the plaintiff asks judgment for eighty thousand dollars and interest, a claim at law for which the defendants are entitled to a jury trial, and also asks judgment for equitable relief, a claim in equity to be tried by the court.

3. That the complaint does not state facts sufficient to con-
163 stitute a cause of action against this defendant.

This defendant asks that as to him the complaint may be dismissed with costs.

JOHN E. PARSONS,
Att'y for Defendant, Theodore M. Davis, Individually and as Receiver of the Ocean National Bank.

Endorsed: Demurrer of def't, Theodore M. Davis, individually and as receiver, &c. Filed May 11th, 1887.

164 *Decision, August* 28, 1885.

BLATCHFORD, *J.:*

It is difficult to see how the defendants, who are alleged in the bill to have taken "upon themselves the performance of the duties of such trustee," sustained any such relation to Wells. The actual trustee in the second mortgage was a defendant in the Sutherland foreclosure suit, and contested in that suit the question of jurisdic-

tion. He filed a bill to foreclose that mortgage. He and Wells were parties to the suit brought by the assignees in bankruptcy, and so was the trustee of the third mortgage. Wells' claim was directly adjudicated against him by the decree of February 12th, 1877, made in the four suits heard together. If the plaintiff desires to impeach that decree he must do it in the court which made it, or by appeal.

All the allegations in the bill of fraud as to matters occurring before the decree relate to questions which could and should have been raised in the suits. The questions as to the sale should
165 have been made in the court which confirmed it; and also the question as to notice of the motion to confirm.

The question of the citizenship of Sutherland, raised and litigated and directly adjudged in his suit, cannot be re-examined in this suit.

Wells was bound by the decree in the foreclosure suit on the second mortgage. No fraud is alleged against the plaintiff in that suit nor is he made a defendant in this suit.

The demurrer is allowed with costs.

Endorsed: Decision. Filed August 28, 1885.

166 At a stated term of the circuit court of the United States for the eastern district of New York, held at the United States court building, in the city of Brooklyn, on the 16th day of May, 1887.

Present: Hon. Samuel Blatchford, circuit justice.

ANDREW W. KENT, as Executor and Trustee under the Last Will and Testament of Jonathan Tremaine Wells, Deceased,
vs.
THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY *et al.*
} In Equity.

This cause having came on to be heard upon the demurrers interposed to the bill of complaint by the defendants, The Lake Superior Ship Canal, Railway and Iron Company, Frederick F. Ayer, as administrator, with the will annexed, of the estate of James C. Ayer, deceased; Gordon Narrie, and Theodore M. Davis, both individually and as receiver of the Ocean National Bank of New York; and having been argued by counsel, Mr. Everett P. Wheeler appearing for the plaintiff and Mr. John E. Parsons for the said
167 defendants, and due deliberation having been had thereupon, on motion of John E. Parsons—

It is ordered that the said defendants, The Lake Superior Ship Canal, Railway and Iron Company, Frederick F. Ayer, as administrator, with will annexed, of the estate of James C. Ayer, deceased; Gordon Narrie, and Theodore M. Davis, both individually and as receiver of the Ocean National Bank of New York, have judgment

that the said demurrers interposed by them to the bill of complaint herein be allowed with costs.

Approved as to form.

SAM'L BLATCHFORD.

JOHN CUMMINS,
Pl'ff's Att'y.

Endorsed: Order allowing demurrer. Filed May 16th, 1887.

168 Circuit Court of the United States for the Eastern District of New York. In Equity.

ANDREW W. KENT, as Executor and Trustee under the Last Will and Testament of Jonathan Tremaine Wells, Deceased,

vs.

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY, Frederick F. Ayer, as Administrator, with Will Annexed, of the Estate of James C. Ayer, Deceased; Gordon Narrie, Theodore M. Davis, and Theodore M. Davis as Receiver of the Ocean National Bank of New York, Impleaded, &c.

This cause having come on to be heard at a stated term of this court, Honorable Samuel Blatchford, circuit justice, presiding, upon the bill and the demurrer thereto interposed by the defendants above named, and having been argued by counsel and, by an order herein entered on the 16th day of May, 1887, judgment having been directed that the said demurrers be allowed with costs, and the costs having been duly adjusted at the sum of one hundred and ninety-two
169 and $\frac{53}{100}$ dollars, now, on motion of Jno. E. Parsons, the attorney for the said defendants, it is adjudged that the demurrers heretofore interposed to the bill by the defendants above named be, and they hereby are, allowed.

And it is further adjudged that the said defendants, The Lake Superior Ship Canal, Railway and Iron Company, Frederick F. Ayer, as administrator, with will annexed, of the estate of James C. Ayer, deceased; Gordon Narrie, Theodore M. Davis, and Theodore M. Davis as receiver of the Ocean National Bank of New York, impleaded, &c., recover of the said plaintiff, Andrew W. Kent, as executor and trustee under the last will and testament of Jonathan Tremaine Wells, deceased, the sum of one hundred and ninety-two and $\frac{53}{100}$ dollars costs, and that they have execution therefor.

Dated the 25th day of May, 1887.

CHAS. L. BENEDICT.

Endorsed: Judgment Filed and entered May 25th, 1887.

170 United States Circuit Court, Eastern District of New York.

ANDREW WESLEY KENT, as Executor, &c.,
against
LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY *et al.*

It is hereby consented that John Cummins be substituted as at-

torney and solicitor for the plaintiff and complainant herein, and that an order to this effect may be entered herein without other or further notice, and that such order may be entered as of April 19, 1887.

Dated N. Y., April 4, 1888.

TUDOR S. JENKS,
Solicitor for Complainant.

171 United States Circuit Court for the Eastern District of New York.

ANDREW WESLEY KENT, as Executor, &c.,
against
THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY *et al.*

On the annexed consent of the attorney and solicitor for the complainant it is ordered that John Cummins be, and he is hereby, substituted as attorney and solicitor for the complainant in the place and stead of Tudor S. Jenks.

And further ordered that this order be entered as of April 19, 1887.

Dated Brooklyn, April 7th, 1888.

CHAS. L. BENEDICT.

Endorsed: Consent and order of substitution. Filed and entered April 7, 1888.

172 United States Circuit Court for the Eastern District of New York.

ANDREW WESLEY KENT, as Executor and Trustee under the Last Will and Testament of Jonathan Tremaine Wells, Deceased, Appellant,
against
THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY, Theodore M. Davis, and Theodore M. Davis as Receiver of the Ocean National Bank of New York; J. Boorman Johnston, Isaac H. Knox, and Gordon Narrie, Being the Surviving Partners of the Firm of J. Boorman Johnston & Co.; Frederick Ayer, Sole Surviving Partner of the Firm of J. C. Ayer & Co.: Frederick F. Ayer, Josephine Ayer, and Benjamin Dean, Administrators, with the Will Annexed, of the Estate of James C. Ayer, Deceased, and Thomas N. McCarter, Appellees.

To the honorable the Supreme Court of the United States:

The appeal of Andrew Wesley Kent, as executor and trustee under the last will and testament of Jonathan Tremaine Wells, deceased, the above-named complainant and appellant, respectfully showeth —

173 That upon the 14th day of February, 1884, the above-entitled action was commenced in the supreme court of the State of New York, in and for the county of Kings, against the above-named defendants and appellees, and that thereafter, by an order made and entered in said supreme court of New York, said cause was removed into the circuit court of the United States for the eastern district of New York, the record upon which removal being filed in the circuit court on the 26th day of May, 1884.

The substance of the bill of complaint in this action is that the predecessor of the appellee company, in the years 1865 and 1866, received grants of large tracts of land from the Congress of the United States through the Legislature of the State of Michigan, with the right to hypothecate or mortgage the same; that subsequently said corporation issued a large number of bonds secured by mortgages upon said lands; that complainant's testator, in 1877, had a first lien upon 8,000 acres of said lands to secure certain of the said bonds issued by said corporation, amounting to $80,000 and interest,

174 and that by a fraudulent combination between certain of the individual appellees a decree was obtained from the United States circuit court for the eastern district of Michigan which on its face adjudged that said testator had no specific lien, and a sale was effected by which the general lien which he, in common with other bondholders, had upon the land in question, with other lands, was apparently divested; that the sale under such decree was fraudulent; that the purchasers at such sale, in combination with certain of the individual appellees, formed the appellee company, to which such purchasers conveyed such property; that such new corporation took such property with notice of the fraud alleged and subject to the rights of the said testator.

The respondent company demurred to the bill of complaint upon the grounds that the court had not jurisdiction of the subject of the action, that there was an improper joinder of causes of action, and that the bill did not state facts sufficient to constitute a cause of action; the other appellees answered, — said demurrer was, by the decision of the circuit court made August 28, 1885, sustained.

175 On May 9, 1887, by an order of the circuit court, the other appellees were permitted to withdraw their answers and to interpose demurrers, which they did, and which demurrers were upon the same grounds as the other, and were, on May 16, 1887, sustained by the order of the circuit court.

That on May 25, 1887, a final decree was made and pronounced in the case, wherein it was, in substance, adjudged and decreed that the said demurrers heretofore interposed to the bill of complaint by the defendants and appellees above named are allowed; and, further, that the appellant, as executor and trustee under the will of Jonathan Tremaine Wells, deceased, pay the sum of $192.53.

Wherefore this appellant appeals from the whole of said decree of said circuit court of the United States, and respectfully prays that the decree of said circuit court and the bill, demurrers, pleadings, and proceedings in the said cause be sent to the Supreme Court of the United States without delay, and that the said Supreme Court

will proceed to hear the said cause anew, and that the decree of the circuit court and every part thereof may be reversed and a
176 decree — overruling said demurrer, with costs, or such other decree as to the said Supreme Court shall seem just.

Dated at New York, March 31, 1888.

JOHN CUMMINS,
Solicitor for Appellant.
EVERETT P. WHEELER, *Counsel.*

Appeal allowed.

CHAS. L. BENEDICT.

Endorsed: Appeal. Filed April 9, 1888.

177 Supreme Court of the United States.

ANDREW WESLEY KENT, as Executor and Trustee under the Last Will and Testament of Jonathan Tremaine Wells, Deceased, Appellant,

against

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY, Theodore M. Davis, and Theodore M. Davis as Receiver of the Ocean National Bank of New York; J. Boorman Johnston, Isaac H. Knox, and Gordon Narrie, being the Surviving Partners of the Firm of J. Boorman Johnston & Co.; Frederick Ayer, Sole Surviving Partner of the Firm of J. C. Ayer & Co.; Frederick F. Ayer, Josephine Ayer, and Benjamin Dean, Administrators, with the Will Annexed, of the Estate of James C. Ayer, Deceased, and Thomas N. McCarter, Appellees.

Know all men by these presents that we, Andrew Wesley Kent and Edward C. Platt, both of the city of New York, State of New York, are held and firmly bound unto The Lake Superior Ship Canal, Railway and Iron Company, Theodore M. Davis, and Theodore M. Davis as receiver of the Ocean National Bank of New York; J. Boorman Johnston, Isaac H. Knox, and Gordon Narrie,
178 being the surviving partners of the firm of J. Boorman Johnston & Co.; Frederick Ayer, sole surviving partner of the firm of J. C. Ayer & Co.; Frederick F. Ayer, Josephine Ayer, and Benjamin Dean, administrators, with the will annexed, of the estate of James C. Ayer, deceased, and Thomas N. McCarter, appellees, in the sum of one thousand dollars, to be paid to the said appellees, their executors or administrators and successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this thirty-first day of March, 1888.

Whereas the above-named Andrew Wesley Kent hath taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the eastern district of New York:

Now, therefore, the condition of this obligation is such that if the

above-named Andrew Wesley Kent shall prosecute said ap-
179 peal to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

ANDREW WESLEY KENT. [SEAL.]
EDWARD C. PLATT. [SEAL.]

Sealed and delivered in presence of—
GEO. H. COREY.

180 CITY AND COUNTY OF NEW YORK, *ss:*

Andrew Wesley Kent and Edward C. Platt, each being sworn, says, each for himself, that he is a resident of State of New York and a householder, and is worth one thousand dollars over and above all his debts and obligations and property exempt by law from levy and sale under execution.

ANDREW WESLEY KENT.
EDWARD C. PLATT.

Sworn to before me March 31st, 1888.
[L. S.]
GEO. H. COREY,
Notary Public, N. Y. Co.

CITY AND COUNTY OF NEW YORK, *ss:*

Be it remembered that on the 31st day of March, 1888, appeared before me the above-named Andrew Wesley Kent and Edward C. Platt, personally to me and to me known to be the individuals described in and who executed the foregoing instrument, and each acknowledged to me that he executed the same for the purposes therein mentioned.

[L. S]
GEO. H. COREY,
Notary Public, N. Y. Co.

Endorsed: Undertaking on appeal. Filed April 9, 1888.

181 UNITED STATES CIRCUIT COURT, *Eastern District of New York,* } *ss:*

I, B. Lincoln Benedict, clerk of the circuit court of the United States of America for the eastern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to one hundred and eighty, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Andrew W. Kent, as executor and trustee, against The Lake Superior Ship Canal, Railway and Iron Company *et al.* as the same remains of record and on file in said office.

In testimony whereof I have caused the seal of said court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, in the second circuit, this sixteenth day of May, in the year of our Lord one thousand eight hundred and eighty-eight,

and of the Independence of the said United States the one hundred and twelfth.

[The Seal of the Circuit Court, Eastern District of New York.]

B. LINCOLN BENEDICT, *Clerk.*

182 By the Honorable Charles L. Benedict, one of the judges of the circuit court of the United States for the eastern district of New York.

To the Lake Superior Ship Canal, Railway and Iron Company, Theodore M. Davis, and Theodore M. Davis, as receiver of the Ocean National Bank of New York; J. Boorman Johnston, Isaac H. Knox, and Gordon Norrie, being the surviving partners of the firm of J. Boorman Johnston & Co.; Frederick Ayer, sole surviving partner of the firm of J. C. Ayer & Co.; Frederick F. Ayer, Josephine Ayer, and Benjamin Dean, administrators, with the will annexed, of the estate of James C. Ayer, deceased; Thomas N. McCarter:

Whereas Andrew Wesley Kent, as executor and trustee under the last will and testament of Jonathan Tremain Wells, deceased, has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the eastern district of New York, made in favor of you, the said Lake Superior Ship Canal, Railway and Iron Company Theodore M. Davis, and Theodore M. Davis, as receiver of the Ocean National Bank of New York; J. Boorman Johnston, Isaac H. Knox, and Gordon Norrie, being the surviving partners of the firm of J. Boorman Johnston & Co.; Frederick Ayer, sole surviving partner of the firm of James C. Ayer & Co.; Frederick F. Ayer, Josephine Ayer,
183 and Benjamin Dean, administrators, with the will annexed, of the estate of James C. Ayer, deceased, and Thomas N. McCarter, and has filed the security required by law:

You are therefore hereby cited to appear before the said Supreme Court at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Brooklyn, in the eastern district of New York, the 12th day of April, in the year of our Lord one thousand eight hundred and eighty-eight.

CHAS. L. BENEDICT.

184 [Endorsed:] 21376. U. S. circuit court. A. W. Kent, executor, &c., appellant, against Lake Superior Ship Canal, Railway and Iron Co. *et al.*, appellees. Citation. John Cummins, solicitor for appellant, 52 William St., New York. Due service of a copy of the within is hereby admitted. Filed April 12th, 1888.

185 United States Circuit Court for the Eastern District of New York.

ANDREW WESLEY KENT, as Executor, &c., Appellant,
against
THE LAKE SUPERIOR SHIP CANAL, RAILWAY & IRON COMPANY *et al.*, Appellees.

Service of a copy of the appeal herein to the Supreme Court of the United States and of the citation thereon is admitted.
April 14th, 1888.

JNO. E. PARSONS,
Att'y for Appellees.

Endorsed on cover: E. New York C. C. U. S. No. 1193. Andrew Wesley Kent, executor and trustee of Jonathan Tremaine Wells, deceased, appellant, *vs.* The Lake Superior Ship Canal, Railway and Iron Company, Theodore M. Davis, and Theodore M. Davis as receiver of the Ocean National Bank of New York; J. Boorman Johnston, *et al.* Filed October 4, 1888.

Office Supreme Court U. S.
FILED.
DEC 4 1891
JAMES H. McKENNEY.
CLERK

SUPREME COURT

OF THE UNITED STATES.

ANDREW W. KENT,
Executor of **JONATHAN T. WELLS,**
Appellant,

vs

THE LAKE SUPERIOR SHIP CANAL RAILWAY AND IRON CO. and others,
Appellees.

BRIEF FOR APPELLANT.

JOHN CUMMINS,
Attorney for Appellant.

EVERETT P. WHEELER,
Of Counsel.

Supreme Court of the United States.

ANDREW W. KENT, Executor of JONATHAN T. WELLS,
Appellant,

vs.

THE LAKE SUPERIOR SHIP CANAL RAILWAY & IRON COMPANY and others,
Appellees.

Brief for Appellant on Appeal from Decree sustaining Demurrer to Complaint.

STATEMENT.

This is an appeal from a decree of the Circuit Court for the Eastern District of New York in favor of the defendants, upon a demurrer to the complaint. The defendants, The Lake Superior Ship Canal Railway and Iron Company, Gordon Norrie, survivor of J. Boorman Johnson and Company, Frederick F. Ayer, survivor of J. C. Ayer and Company and Theodore M. Davis, demurred for want of jurisdiction, for improper uniting of causes of action and for want of facts sufficient to constitute a cause of action (pp. 94–97). Mr. Justice Blatchford's opinion sustaining the demurrers will be found at pages 97 and 98 of the Record.

The action was originally brought in the Supreme Court of the State of New York, and was removed to this Court by the defendant company and by the other demurring defendants. The

plaintiff claims that in 1877 his testator had a first and specific lien on 8,000 acres of land in Michigan, to secure bonds to the amount of $80,000, with interest, and that by a fraudulent combination between the individual defendants, Theodore M. Davis, J. C. Ayer and Company, and J. Boorman Johnson and Company, a decree was obtained from the U. S. Circuit Court for the Eastern District of Michigan, which on its face adjudged that the testator had no specific lien, and a sale was effected by which the general lien which he, in common with other bondholders originally had upon the land in question with other lands, was divested.

The object of the suit is to obtain a decree: (pp. 20, 21.)

1. That so much of the decree of the Michigan Court as purports to divest the Wells' lien shall be adjudged fraudulent and void.

2. That the sale of the 8,000 acres, had under this decree, be adjudged to be inoperative as against the plaintiff.

3. That the defendant Company account for the proceeds of so much of this land as it has sold to *bona fide* purchasers for value.

The demurrers to the complaint are at pp. 94, 96, 97.

The allegations of the complaint material to the controversy are as follows:

1. The Portage Lake and Lake Superior Ship Canal Company, the name of which was afterwards changed to The Lake Superior Ship Canal R. and Iron Company, was incorporated to build a canal from Portage Lake to Lake Superior (Complaint, Art. 2, p. 2).

2. Congress made two successive land grants of 200,000 acres each to the State of Michigan, to aid in the construction of this canal, and the State of Michigan granted the land to the Canal Company for that purpose (p. 2). The plaintiff's 8,000 acres are part of the second grant. The first was made March 16, 1865, and the second July 3, 1866 (pp. 2, 3). The company afterwards acquired an interest in a third grant, but that is not material in this suit.

3. July 1, 1865, the company mortgaged its canal and the first land grant to C. C. Douglass, as trustee, to secure the pay-

ment of 1,000 bonds of $500 each. John L. Sutherland was afterwards substituted as trustee (pp. 2, 5). This trust deed is Exhibit A (pp. 21–28).

4. July 1, 1868, the company mortgaged its canal and the second land grant to Martin and Davis to secure 1,000 bonds of $500 each. Lucien Birdseye was afterwards substituted as trustee (pp. 3–5). This trust deed is Exhibit B (pp. 23–38).

One of the clauses of this deed is as follows (p. 15, fol. 44, p. 53):

"And it is further provided, that it shall be lawful for the said party of the second part (the trustees), their survivors or successors, and it shall be his or their duty so to do, from time to time, and at all times, when requested thereto by the said party of the first part (the Canal Company), to release to the said party of the first part, from the operation and incumbrance of this mortgage, any of the lands herein mortgaged, the same being part of the lands granted to the said party of the first part by said Act of Congress of July 3, 1866, upon said party of the first part delivering up to the said party of the second part, their survivors or successors, to be cancelled, bonds hereby secured, equal to the payment for said lands so to be released, at the rate of five dollars per acre."

5. July 1, 1870, the company mortgaged its canal and the two land grants to Charles L. Frost, to secure 1,250 bonds of $1,000 each. Thomas N. McCarter was afterwards substituted as trustee (pp. 3–5). This trust deed is Exhibit C, pp. 39–52.

One of the clauses of this deed is as follows (pp. 11–12, 48–49):

And it is also provided, that the said trustee, or his successor, may appoint or employ, at the expense of the party of the first part, all such attorneys, clerks or other agents, as he may deem necessary for the proper execution of the trusts and powers hereby created; and the said party of the first part, for itself, its successors and assigns, also covenants and agrees to and with the said party of the second part and his successor, and with each and every holder of any one or more of the bonds hereby secured, that under and by virtue of the clauses and provisions in the mortgage or deed of trust to D. Randolph Martin and Thomas T. Davis, trustees, hereinbefore referred to, relative to the releasing from the incumbrance thereof, any of the lands of the grant of July 3, 1866, thereby mortgaged, the

said party of the second part, or his successor in the office as trustee, or any holder of one or more of the bonds secured by this deed may, at any and at all times, require the party of the first part to procure, in the mode provided in said mortgage or deed of trust, a release or releases from the incumbrance thereof of any of the lands mortgaged hereby; and that whenever the said party of the second part or his successor, as trustee, or any one of the holders of one or more of the bonds hereby secured, shall make such requirement in writing, specifying and describing the lands which may be so sought and desired to be released; and shall furnish and tender to said party of the first part, either in cash or in bonds secured by the said mortgage or deed of trust to said D. Randolph Martin and Thomas T. Davis, a sum equivalent to the lands so specified at five dollars an acre; the said party of the first part shall pay or deliver the same to D. Randolph Martin and Thomas T. Davis, trustees, or the survivor of them, or his successors or successor, and procure such release therefrom of the lands so specified and desired to be released; and the party of the first part hereby constitutes and appoints the said Charles L. Frost, trustee, or his successor in this trust, its true and lawful attorney irrevocable, with power of substitution, at any and all times, to do any and all necessary acts and things in the name of said party of the first part, or otherwise to procure a release or releases of any of said lands from said mortgage under the provisions and stipulations for that purpose therein contained; and it hereby authorizes and requests and directs said D. Randolph Martin and Thomas T. Davis, trustees, or the trustee or trustees of said mortgage for the time being, to make, execute and deliver to all and any of the holders of the bonds herein secured, at any and all times, such release or releases of any of the lands described and included in said mortgage from the incumbrance thereof, as may be desired and required to be released by said holders of said bonds hereby secured, on receiving from him or them, in cash, or in the bonds secured by said mortgage, a sum equivalent to the lands sought to be released at five dollars an acre. And the party of the first part further covenants that the sum or sums which, in cash or bonds, may be in any manner as above prescribed, used and appropriated by the said party of the second part, or by the holder or holders of any of the bonds hereby secured in procuring such release or releases, shall be added to and deemed a part of the principal sum secured, to be paid by the said bonds held by the person or persons so using or appropriating the same and the same shall become forthwith due and payable. And the party of the first part hereby agrees to pay the same; provided, however, the land or lands so released from the incumbrance of the said mortgage to D. Randolph Martin and Thomas T. Davis, shall still, after such

release, be owned by the said party of the first part, subject only to the incumbrance hereby created, to the amount of the bond or bonds hereby secured, owned by the person or persons procuring such release, with the amount of the money or bonds secured by the mortgage to said D. Randolph Martin and Thomas T. Davis given for such release, added thereto.

6. The effect of the deeds thus given was to subject the second land grant to two general liens, one of the Birdseye mortgage, to the amount of $500,000, and the other of the McCarter mortgage, to the amount of $1,250,000.

The title being thus incumbered, Jonathan T. Wells became the holder and owner of eighty bonds secured by the Birdseye mortgage, of the par value of $40,000, and forty bonds of the McCarter mortgage, of the par value of $40,000 (Complaint, Articles sixth and eighth, pp. 3, 4).

7. May 1, 1871, the Canal Company executed a fourth mortgage upon all its property to the Union Trust Company (p. 4). The company, in November, 1871, and January, 1872, made default in the payment of interest upon its several issues of bonds (p. 5). A large number of the bonds of the various issues were then held by the Ocean National Bank, of which Theodore M. Davis became Receiver, by J. C. Ayer & Company, and by J. Boorman Johnson & Company (p. 5), who, for brevity, we may call the Davis party.

Not content with their legal right to require the several trustees to foreclose the respective mortgages, sell the property for the best possible price, and pay the bonds as far as possible, these bondholders undertook to acquire the whole property of the Canal Company for themselves, to the exclusion of the other bondholders, and they succeeded in accomplishing this scheme. This is the grievance of which the plaintiff complains. To this end they retained their own attorney in Michigan, Alfred Russell, and prevailed upon the three trustees of the first three mortgages to allow them to use the names of the trustees in such proceedings as they might undertake; and they indemnified these three trustees—Sutherland, Birdseye and McCarter—against all loss or damage which might arise to them by reason of any matter or thing which, they, the said bondholders might do (Article seventeenth, p. 6).

9. The Davis party of bondholders thereupon, on the 25th of May, 1872, filed a bill in the United States Circuit Court for the Eastern District of Michigan, in the name of Sutherland, to foreclose the first mortgage. The Canal Company and the other three trustees were made defendants. Sutherland was a citizen of New York, and Birdseye was a citizen of the same State. To give the Court an apparent jurisdiction of the controversy between them, it was alleged that Sutherland was a citizen of New Jersey. A motion for a Receiver was made, and on this motion Birdseye's solicitors admitted that Sutherland was a citizen of New Jersey. Isaac H. Knox, one of the Davis party, was appointed Receiver in this Sutherland suit June 13, 1872 (Art. 18, pp. 6, 7). The plaintiff claims that this receivership extended only to the property described in the Sutherland mortgage, both because of the want of jurisdiction as to Birdseye, and because of the fact that the Sutherland mortgage did not cover the second land grant (p. 7, Art. 25, p. 9). The facts as to the citizenship of Sutherland were alleged and proved in this Sutherland suit (Art. 24, p. 9).

10. June 17, 1872, an order was made in the Sutherland suit authorizing the Receiver to issue certificates of indebtedness for the purpose of completing the canal. The order made these a first lien upon *all* the property of the Canal Company, and authorized the Receiver to sell them at a discount of not over 25 per cent. (Art. 19, p. 7). The Receiver issued certificates to the amount of $640,000, which were bought by Johnson and Ayer, and of these $140,000 were issued at sixty cents on the dollar (Art. 20, p. 7).

11. August 27, 1872, the Canal Company was adjudged bankrupt and Jerome and Beaman were appointed assignees (Art. 21, p. 8). They were made parties defendant to the Sutherland suit. July 5, 1872, a bill was filed by Alfred Russell, in the name of Birdseye to foreclose the Birdseye mortgage. The canal company, McCarter and the Union Trust Co., were made parties defendant and the assignees were afterwards brought in as defendants (Art. 23, p. 8). The bill in this suit alleged that the Receiver's certificates were a lien to the amount of about $500,000, upon all the property of the canal company, prior to the lien of any of the mortgages (Art. 23, p. 8). This

admission made in the name of Birdseye who was trustee for Wells as well as for the Davis bondholders was in violation of his duty. It was really made by the Davis party who had taken upon themselves the execution of Birdseye's trust and was part of the fraudulent scheme to freeze out Wells and the bondholders not in the combination (Art. 23, p. 8). For the same reason Birdseye never apprised the bondholders whose rights he ought to have protected of the proceedings that were taken by Russell in his name, the whole object of which was to fraudulently increase the amount of the Receiver's certificates, and use them to divest the title of all who were not in the Davis combination (Art. 26, p. 10).

12. August 11, 1873, Jonathan T. Wells delivered to Birdseye eighty of the bonds secured by the Birdseye mortgage of the par value of $40,000, and received from him pursuant to the terms of that mortgage a release, whereby Birdseye released 8,000 acres of the second land grant from the lien of his mortgage, except only a lien to the amount of the bonds tendered. Wells was also the owner of forty of the bonds secured by the McCarter mortgage, of the par value of $40,000, and these he exhibited to Birdseye at the time of the delivery of the eighty bonds. The release declares, pursuant to the provisions of the McCarter mortgage, that the 8,000 acres of land are free and clear of all encumbrance, except to the amount of $80,000, and belonged to the Canal Company in fee, subject only to such lien, and that the amount of said bonds had become at once due and payable (Articles 28, 29, pp. 12, 13). The release is Ex. D, pp. 52-62).

13. In September, 1873, Jerome and Beaman, as assignees of the canal company, filed a cross bill in the same Circuit Court in which the foreclosure suits were pending, to which they made all the trustees, and Jonathan T. Wells, parties defendant. The bill admits the rights of Wells under the release. Birdseye answered, admitting this allegation. The bill was taken *pro confesso* as to Wells. No testimony was taken which had any bearing whatever upon the effect of said release. The object of the suit was to obtain a sale of the entire property in parcels or otherwise as the Court should direct, and to provide for the ascertainment of the amounts due the several parties having claims against the same (Articles 31, 32, p. 14).

14. It thus appears that in the only suit to which Wells was a party, his rights under the release were formally admitted as long ago as 1873. His release was duly recorded (p. 62). What was done between that time and 1877 does not appear. In 1877, however, the plan which had been formed, to deprive of their rights the bondholders who were not of the Davis party, culminated. The latter agreed among themselves to procure a sale of the entire property of the Canal Company, buy it in for their own benefit to the exclusion of the other bondholders, and form a new company of which they should be the stockholders, and to which the property of the old company should be conveyed. Wilson and Man were named as trustees to buy in the property and carry out this arrangement (Art. 32, p. 14).

15. In pursuance of this scheme, Alfred Russell represented to Judge Emmons that an arrangement had been made to sell the whole property of the Canal Company to English capitalists for a sum sufficient to pay the entire debts of that company, and that to carry out this agreement it was necessary to sell the whole property of the company under a decree of the Court, and that *such decree would be satisfactory to all parties interested*. By these representations, without any notice to Wells or his solicitor, Russell obtained from Judge Emmons, at his house, an order that the bill filed by Jerome and Beaman be treated as a cross bill in the Sutherland, the Birdseye and the United Trust Company foreclosure suits, and that the four causes be heard together upon the pleadings and proofs in all (pp. 14, 15). This order was dated February 12, 1877, and is Exhibit E (pp. 63–64). At the same time and place a decree was signed by Judge Emmons, entitled in the four suits, which contained the following clause (pp. 15, 71):

"*Twenty-first.*—It is hereby ordered, adjudged and decreed, that the attempt of the defendant, Jonathan T. Wells, to redeem or obtain release of certain lands from the lien of the mortgage of the first of July, 1868, and the alleged release of said land by Lucien Birdseye, trustee, as set forth in said cross complaint, having taken place after the institution of the suit for the foreclosure of said mortgage, were and are ineffectual and void."

The decree further adjudged that the Receiver's certificates

for the amount of $934,478—principal and interest—were a first lien upon the canal and the first and second land grants, but not a lien upon the third land grant. (Decree, Ex. F, clauses 15 and 19, pp. 69, 71). It required that the lands covered by the Birdseye mortgage should be sold separately, and gave various directions as to the method to be adopted by the Master for distributing the proceeds (pp. 72, 73).

16. The Davis party advertised the sale under the decree in but one paper, and that a village newspaper of limited circulation. They refused to advertise more extensively. They gave no notice of the terms of sale. They required at the sale that the whole amount of the purchase money should be paid at once, without giving the purchaser any opportunity to examine the title. And they refused to sell the second land grant separately. These acts are relied on as badges of fraud (Art. 38, pp. 16, 17).

17. At the sale thus conducted, Man and Wilson bought the entire property of the canal company for $550,000, which they paid in Receiver's certificates (Art. 39, p. 17). They then, in combination with the other members of the Davis party, formed a new company, which is one of the demurring defendants. To this company they conveyed all the property of the old company. The new corporation and its officers had notice of the fraud, paid no new consideration, and took title subject to the right of Wells (Article 40, p. 18).

Errors Assigned.

The decree appealed from is erroneous in the following particulars:

1. It should have overruled the demurrers with costs.

2. It should have adjudged that upon the facts stated in the complaint, the plaintiff was entitled to a decree

First.—That the said decree made and entered as of date, the 12th day of February, 1877, was without jurisdiction,

fraudulent, null and void, in so far as the provisions thereof declare the release given to said Jonathan Tremaine Wells, as hereinabove set forth, to be void or ineffectual, and in so far as the provisions of said decree give to the said Receiver's certificates a paramount lien upon those lands covered by the Birdseye trust deed, of date July 1, 1868, which were released to the said Jonathan Tremaine Wells, in and by said instrument of release, or so far as the provisions of said decree give any right of prior payment out of the moneys arising from the sale or other disposition of the property described in said release and covered by the said Birdseye trust deed as against the bonds held by said Jonathan Tremaine Wells as aforesaid, or against his claims under said release, and so far as said provisions give any validity whatever to the said Receiver's certificates as a payment for said lands or any part thereof.

Second.—That the sales of the said property granted to said canal company under the said Act of Congress of July 3, 1868, and included in the Birdseye trust deed, of date July 1, 1868, and particularly described in the said deed of release to Jonathan T. Wells, and the deeds thereof executed by the Master to said Man and Wilson, and by them to the aforesaid corporation, be declared to be in trust for the said Jonathan T. Wells.

Third.—That the plaintiff, as trustee and executor of the last will and testament of the said Jonathan Tremaine Wells, has succeeded to all the rights of said Wells in the premises and has the first and paramount lien upon the said eight thousand acres of land described in said instrument of release, to the extent of the principal sum of said one hundred and twenty bonds, with interest thereon described in said release and owned and held by said Wells as aforesaid, to wit, the sum of eighty thousand dollars, with interest as aforesaid.

Fourth.—That the defendants account to this plaintiff for the profits they have made by reason of their fraudulent dealings aforesaid with the property so held in trust for said Wells, and for compound interest thereupon, and that they may be adjudged to pay to the plaintiff whatever sums of money may be found upon such accounting to be owing from them to him.

POINTS.

First.

The facts alleged constitute a cause of action.

The facts thus alleged in the complaint charged a fraudulent conspiracy, carried to a conclusion by certain legal forms, the parties contriving and benefiting by the conspiracy, being bondholders who, by a series of fraudulent manœuvres in the U. S. Circuit Court for the Eastern District of Michigan, succeeded in depriving the plaintiff of the general and specific liens given him under the Birdseye and McCarter mortgages. They obtained the mortgaged property themselves by the familiar device of issuing Receiver's certificates at a ruinous discount, selling the mortgaged property on foreclosure, and buying it and paying for it in such Receiver's certificates. As part of this conspiracy the plaintiff charges that these bondholders were acting in the name of Birdseye who was trustee under the first mortgage on the second land grant, that they therefore owed a duty *to Wells to protect his interest*, that they violated this duty by admitting the validity and priority of the Receiver's certificates as a lien on the second land grant, and by obtaining a degree against Wells from the Circuit Court for the Eastern District of Michigan. This decree was in contradiction of the admissions in the cross-bill, was not based upon or in any way supported by any testimony taken in any of the actions, was in fraud of the plaintiff's rights, and obtained secretly, collusively, by misrepresentation to the Court, and without notice to the plaintiff, though he was a party to the action. The complaint asks that so much of this decree so obtained (which will hereinafter be alluded to as the decree of February 12, 1877) as adjudged that the release by Birdseye was invalid, and that the Receiver's certificates were a prior lien, be adjudged fraudulent and void, and that the title acquired under it by defendants be adjudged to be in trust for plaintiff and that they account etc. (pp. 19, 20). The demurrers admit that the allegations of the complaint are true. If they be true, there can be no question but that at

some time and in some proceeding, they constituted a cause of action, and entitled the plaintiff to relief from the said decree. The only question is now whether at *this time and in this proceeding*, the facts sets forth entitle the plaintiff to the relief he seeks; or to any relief.

Second.

The facts showing the Decree of February 12, 1877, to be fraudulent and void were sufficiently pleaded.

Articles 32, 33 and 34 of the complaint (pp. 14 and 15) set forth the specific and fraudulent steps and devices by which the decree of February 12, 1877, was obtained. Previous articles allege the details of the prior frauds. The complaint complies with the requirement of this Court as to the necessity of specific allegations to sustain an original bill to set aside judicial proceedings for fraud.

U. S. *vs.* Atherton, 102 U. S., 372.
Quinby *vs.* Conlan, 104 U. S., 426.

Third.

An original Bill to impeach the judgment was the proper form of proceeding.

The decree was a decree made by consent of counsel. It was a fraudulent decree, and it was an erroneous decree. Such is the charge made in the bill of complaint, and for the purposes of this appeal these charges must be considered as true. In this case, therefore, the plaintiff's only remedy was by original bill to impeach for fraud the decree rendered by the Circuit Court for the Eastern District of Michigan. The term at which the decree was entered expired before the fraud and error were discovered.

"In the case of a decree in equity the Court may set it aside during the term in which it was entered. If, however, the term has expired, and it is sought to impeach the decree for fraud, collusion and the like, the remedy is by original bill in the nature of a bill of review, which may be filed without leave of Court."

Black on Judgments, Sect. 484 *a*.
Wright *vs.* Miller, 1 Sandf. Ch., 103.
1 Daniel Ch. Pr., 4th Am. Ed., pp. 164, 173.
3 *Ibid* 1854.
Evans *vs.* Bacon, 99 Mass., 213.
Johnson *vs.* Johnson, 30 Ill., 215.
Sanford *vs.* Head, 5 Cal., 297.
Patch *vs.* Ward, Law Rep. 3 Chan. App., 203, 206.

This Court has held that a Federal Court cannot upon motion or petition, modify a decree after the expiration of the term at which it was rendered. In the Federal Courts decrees are deemed to be enrolled at the term of the Court at which they are made.

Story Eq. Pl., Sect. 403.
Whiting *vs.* Bank U. S., 13 Peters, 611.
Bronson *vs.* Schulton, 104 U. S., 415.

The learned Judge who upheld the demurrer, does not deny these propositions, but sustained the demurrer on the following ground (p. 98):

"If the plaintiff desires to impeach that decree, he must do it in the Court which made it, or by appeal."

In this we respectfully submit he was in error. The decree could not be impeached by appeal, because the fraud was not discovered until May, 1879, at which time the two years limitation of time to appeal had expired.

U. S. Rev. Stat. §1008.

The decree of February 12, 1877, could not be impeached by original bill in the Court which made it. The Circuit Court of the United States for the Eastern District of Michigan would not have had jurisdiction of the present suit. None of the defendants, except the Canal Company were citizens

of Michigan or residents in that State, (p. 91) and they were all necessary parties to the bill.

The true rule is thus stated by Lord Chancellor Hardwicke.

"Where a decree is made by consent of counsel, there lies not an appeal or rehearing, though the party did not really give his consent; but if such decree was by fraud and covin the party may be relieved against it, not by rehearing or appeal, but by original bill." (Richmond *vs.* Tallicur, 1 Dick., 38., Floyd *vs.* Mansell, Gilb. Eq. Rep., 185.)

Bradish *vs.* Gee, 1 Amblers' Ch. 229.
Pemberton's Case, 40 N. J. Eq. Rep., 520.
Story's Equity Pleading, Sect. 426.

This bill need not be filed in the same Court which rendered the decree complained of. A Court of equity has jurisdiction of a suit to impeach for fraud a decree rendered by another Court.

Arrowsmith *vs.* Gleason, 129 U. S., 86.
Gaines *vs.* Fuentes, 92 U. S., 10, 20.
De Forest *vs.* Thompson, 40 Fed. Rep., 375. (Harlan and Thompson, JJ).
Winchester *vs.* Evans, 3 Haywood (N. C.) 305, 316.
Wilmore *vs.* Flack, 96 N. Y., 512.
Dobson *vs.* Pierce 12 N. Y., 156.

In this case the New York Court of Appeals sustained the validity of a suit brought in the Court of Chancery of Connecticut, to enjoin the collection of a judgment recovered in the State of New York, and held that the decree of the Connecticut Chancery on that subject was conclusive upon the parties in New York. This case was approved in

Cole *vs.* Cunningham, 133 U. S., 107, 112.

The true reason for the rule on this subject is that the Court of Equity, in reference to actions of this description, does not sit as a Court of review. It acts *in personam*, and wherever it can find the parties guilty of fraud, takes from them benefits which they have procured thereby.

The jurisdiction to do this rests on the solid foundation that fraud vitiates all proceedings, whether apparently judicial or

otherwise, and that a fraudulent judgment is really no judgment at all.

Lord Brougham expressed this most accurately in

Earl of Bandon *vs.* Becher, 3 Cl. & Fin., 479.

"A sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled. In order to make a sentence there must be a real interest, a real argument, a real prosecution, a real defence, a real decision. Of all these requisites not one takes place in the case of a fraudulent and collusive suit; there is no Judge, but a person invested with the ensigns of a judicial office is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question. On the whole I am of opinion that this case falls within the rule there stated, and which I quote from Mr. Wedderburn's statement because of the aptness of the expressions. It is not an irregularity, it is not an error which is here complained of, but it is that the whole proceeding is collusive and fraudulent; that it cannot therefore be treated as a judicial proceeding, but may be passed by as availing nothing to the party who it sets up."

So in Johnson *vs.* Waters, 111 U. S., 667, Mr. Justice Bradley says:

"The most solemn transactions and judgments may at the instance of the parties be set aside for fraud. In such cases the Court does not act as a Court of review, nor does it inquire into any irregularities or errors of proceeding in another Court, but it will scrutinize *the acts of the parties*, and if it finds that they have been guilty of fraud in obtaining a judgment or decree it will deprive them of the benefit of it and of any inequitable advantage they have derived under it."

Gaines *vs.* Fuentes, 92 U. S., 10, 22.
Barrow *vs.* Hunton, 99 U. S., 80, 83.
Metropolitan El. R. Co. *vs.* Manhattan R. Co., 14 Abb. N. C., 103, 216.
Kennedy *vs.* Daly, 1 Sch. & Lef., 355, 374.

This is especially true where parties have misled the Court by false statements.

Vadala *vs.* Lawes, 25 Qu. B., Div., 310.
Abouloff *vs.* Oppenheimer, 10 Ibid, 295.

The only doubt that has ever been raised in this country upon the point in question, arose under the Act of Congress of May 26, 1790, re-enacted U. S. Rev. Stat., §905. But this by its terms applies only to "the records and judicial proceedings of the Courts of any State or territory." Even as to these the rule as already shown, is well settled that a Court of Equity in one State will take from wrongdoers residing or found in that State, the spoils which they have obtained by fraud under guise of a judicial decree of the Court of another State.

In the case of decrees of the Circuit Courts of the United States the Court is not restrained by this statute. The Court that administers justice will be swift to punish all that abuse the forms of law and make them instruments of fraud.

The more sacred a just decree the more odious one that is fraudulent.

There are, however, statutes that define the jurisdiction of the several Circuit Courts as to the district in which suits are to be brought herein. These do not differ in their reason and spirit from the statutes of the several States prescribing the county in which the venue should be laid. The United States constitute one government. The Circuit Courts of the United States are created by one authority, and have identical jurisdiction, so far as the subject matter is concerned.

"If one system of co-ordinate Courts more than another calls for the application of these general principles it is that of the Circuit Courts of the United States. * * * * Although divided in jurisdiction, geographically, they constitute a single system, and when one Court has fully considered and deliberately decided a question, every suggestion of propriety and fit public action, demand that it should be followed until modified by the Appellate Court."

Goodyear, &c. Co. *vs.* Mills, 7 Off. Gazette, 40.
Wells *vs.* Oregon Railway & N. Co., 15 Fed. Rep., 570.

Clearly, it must have the same authority over all persons within its jurisdiction that any other Circuit Court would have over other persons within its jurisdiction. The Circuit Court of Michigan could have redressed this wrong if it had acquired jurisdiction of the wrongdoers. Why should not the Circuit Court for New York do the same when by their own act, the wrongdoers have invoked its jurisdiction?

Fourth.

Errors in Michigan Decree.

I.—Lien of Receiver's Certificates.

The decree of February 12, 1877, was erroneous in two vital points.

I.—As to the lien of the Receiver's certificates.

II.—As to the effect of the Birdseye release.

I.—The Receiver's certificates, issued in a suit to foreclose a mortgage on the canal and the first land grant only, were adjudged to be a first lien upon the second land grant. The 200,000 acres of land included in this grant were not subject to the mortgage on the first land grant. They were no part of the subject-matter of the suit to foreclose that mortgage. The Court had no power to make certificates, issued in that suit, a lien on any land not included in it.

The power to issue Receiver's certificates is purely incidental. The only justification for issuing them at all is that the Court should preserve the property which it has undertaken to administer, and that the expenditure of the money raised upon these certificates will benefit this property to an amount greater than the incumbrance imposed by them.

In the nature of the case, how can the Court create a lien upon other property not the subject of the suit?

The Court does not own this property. The suit is not brought with any relation to it.

All the cases which treat of Receiver's certificates limit the lien to the property which is the subject-matter of the suit. In Wallace *vs.* Loomis, 97 U. S., 146, the Court say (pp. 162, 163):

"The power of a Court of equity to appoint managing Receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such Receivers to raise money necessary for the preservation and management of the property, and make the same chargeable *as a lien thereon* for its repayment, cannot, at this day, be seriously disputed. It is a part of that jurisdiction, always exercised by the Court, by which it is its duty to protect and preserve the trust funds in its hands. It is, undoubtedly, a power to be exercised with great caution, and, if possible, with the consent or acquiescence of the parties interested in the fund."

This decision is quoted with approval in

Union Trust Co. *vs.* Illinois Midland Co., 117 U. S., 434, 454.

The Receiver's possession in mortgage cases is only a substitute for that of the mortgagee: "A Receiver has no greater right than a mortgagee to improve a mortgagor out of his estate."

Jones on Corporate Bonds and Mortgages, Section 541.

In the case disclosed by the bill, not only was the mortgagor improved out of the property covered by the mortgage, but out of 200,000 acres on which that mortgage was not a lien.

In Wallace *vs.* Loomis, 97 U. S., 146, at p. 162, the Court says:

"The power of a Court of equity to appoint managing Receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such Receivers to raise money for the preservation and management of the property, and make the same chargeable *as a lien thereon* for its repayment, cannot, at this day, be seriously disputed. It is a part of that jurisdiction, always exercised by the Court, by which it is its duty to protect and preserve the trust funds in its hands."

If it be said that Birdseye, the trustee of the mortgage upon the second land grant, was a party defendant in the suit on the Sutherland mortgage, and therefore bound by the order, we answer:

1. He was made defendant only to cut off the lien of his mortgage, which was the second incumbrance upon the first land grant (Article 18, p. 6). This gave the Court no power to create a lien upon the land not included in the first mortgage on this first land grant.

2. The attempt to make the Receiver's certificates a *lien* on the second land grant was part of the fraudulent conspiracy averred in the complaint (Articles 23, 25, 26, pp. 8–10).

3. The complaint avers and the demurrer admits that Birdseye was a citizen of the same State as Sutherland (Article 18, p. 7). Mr. Justice Blatchford, in his opinion (p. 98), says:

"The question of the citizenship of Sutherland, raised and litigated, and directly adjudged in his suit, cannot be re-examined in this suit."

In this statement the learned Judge erred. The citizenship of Sutherland is nowhere adjudged. The only judgment of the Michigan Court is Exhibit F (pp. 64–77), and it nowhere contains any adjudication on this point.

Fifth.

Errors in Michigan Decree.

II. Effect of Birdseye Release.

The decree of the Michigan Court erroneously adjudged that the proceedings of Wells, to obtain the release from the Birdseye mortgage, "having taken place after the institution of the suit to foreclose said mortgage were and are ineffectual and void" (p. 71).

The only objection taken to the validity of these proceedings is that they were taken after the commencement of the suit to foreclose the Birdseye mortgage, and the equity maxim "*Pendente lite, nihil innoretur*," is invoked. This maxim, however, has no application to the case at bar. It never applied to those claiming under the plaintiff by transfer subsequent to the commencement of the action. It means that purchasers *pendente lite* are bound by the decree on the ground that they have constructive notice of the pendency of the action. But it was never carried so far as to hold that new rights might not be acquired, *pendente lite*. These new rights could, in equity, be presented to the Court by supplemental bill, cross bill, or supplemental answer, as the case might require, and at common law by plea, *puis darrein continuance*.

In the proceedings in the Michigan Circuit Court, these rights were presented to the Court and admitted by the bill of complaint in the Jerome and Beaman suit. Jonathan T. Wells was made defendant, and as the bill admitted his rights, he appeared and allowed it to be taken *pro confesso*.

This bill was ordered by the Circuit Court to stand as a cross-bill to the several bills that had been filed to foreclose the several mortgages, and among them the Birdseye mortgage. Thus Wells' rights were fully admitted on the record. His grievance is, that these rights were apparently divested, and he seeks to set aside this judgment in order to enable him to enforce his rights.

If a mortgagor had *pendente lite* paid the whole amount due on the mortgage, and this appeared upon the record, but notwithstanding, a fraudulent decree of foreclosure and sale were to be rendered, could he not sue to set this aside? Or if a

mortgagee *pendente lite* were to release part of the mortgaged premises, and this were to be stated on the record, yet notwithstanding a fraudulent decree were to be rendered for the sale of the released premises, could not the releasee sue to set it aside? These cases are precisely analogous to that at bar, and sustain the right of Wells or his executor to bring the suit.

If this were a bill of review for error apparent on the record it could be sustained.

"It has been before stated, on a bill of review, we cannot question the truth of the facts upon which the Court acted in making up the decree, nor of the mode in which the Court below came to the determination of the existence of those facts; but we are only to examine and see if the questions of law arising on those facts have been properly determined. In doing this, however, we must look at the whole record, and if we find that the Court below found any facts to exist and acted upon them, which are not founded upon, or are inconsistent with the statements in the bill, those facts must be rejected, because if the averments in the bill do not warrant the judgment of the Court, there is an error on the face of the proceedings, for no proof could legimately be given to entitle the party to more relief against any of the defendants than the averments in the bill show that he ought to have. The proofs must necessarily be confined within the statements of the bill."

Griggs *vs.* Geer, 3 Gilman (Ill.) 13-14.

A fortiori, where the decree was obtained by fraud, will the Court redress the wrong.

It is to be observed that the argument in this and the last Point is advanced to show the wrong that has been done the plaintiff. His remedy grows out of the fraud. His right arises from the errors committed to his prejudice.

Sixth.

Defendants took the property charged with a trust for plaintiff.

I.—Even if there were no error in the Michigan decree the complaint charges a fraudulent use of it, involving a breach of trust. The trustee McCarter was bound to cause the property to be sold in such a way as to protect the rights of all the bondholders including Wells.

If there were no actual fraud in the case the lien of the plaintiff would still be protected. Parties who are not themselves trustees, but who take upon themselves the execution of a trust, are subject to all the liabilities and duties of the trustee.

Oliver *vs.* Piatt, 3 How., 333.
Bush *vs.* Bush, 1 Strob, Eq. S. C., 377.
Bailey's Appeal, 96 Pa. St., 253.

In this case it is admitted by the demurrer that Davis and his confederates did take upon themselves the execution of the trust which devolved upon Birdseye and McCarter. It was their duty, therefore, to protect the rights of Wells. They had no more right to buy in the property of the Canal Company to the exclusion of Wells than McCarter himself would have had. The property itself or its proceeds are, therefore, subject to his right.

Drury *vs.* Cross, 7 Wall., 299.

The learned Justice says on this subject (p. 97): "It is difficult to see how the defendants, who are alleged in the bill to have taken upon themselves the performance of the duties of such trustee, sustained any such relation to Wells." We respectfully point out how it was. They were originally beneficiaries of a trust. It was the duty of the trustee to administer the trust. The Davis party indemnified the trustee, took the discharge of his duties out of his hands, used his name, but did themselves whatever was done. Is it not clear, upon the authorities cited, that they became charged with all the obligations of the trustee himself? One of these was to protect impartially the rights of all the beneficiaries.

The learned Justice says that no fraud is alleged against Birdseye, the trustee. True, because his only error was in giving up to the Davis party the administration of his trust. In effect, he resigned and they became trustees. Fraud is charged against them.

Moreover, as shown under the Eleventh Point Birdseye, ceased to be trustee when he executed the release. McCarter was trustee for Wells, and he is made party defendant.

II.—"It is a rule of equity jurisdiction, perfectly well settled, and of universal application, that when property held upon any

trust to keep or use or invest it in any particular way, is misapplied by the trustee, and converted into different property, or is sold, and the proceeds are thus invested, the property may be followed wherever it can be traced through its transformations, and will be subject, when found in its new form, to the rights of the original owner or *cestui que trust.*"

Cook *vs.* Tullis, 18 Wallace, 332.
Wormley *vs.* Wormley, 8 Wheat., 421.
Smith *vs.* Bowen, 35 N. Y., 83.
Boyd *vs.* Brinckin, 55 Cal., 427.

And where the parties who have committed the fraud, or are affected with notice of it, form a new company, and convey the property to it, that company is in like manner affected by the trust, and takes the land subject to it.

"The charge of knowledge by the new company cannot be denied, and whatever that knowledge imposed must be borne by it. It is a well settled principle of law, that a purchase, though for a valuable consideration, from a trustee, with knowledge of the trust, carries with it all the obligations of the trust. * * * The defendants, the New York Elevated R. R. Co., having taken by purchase from the defendant, Cowing, and in an unauthorized mode, are to be considered as substituted trustees to the extent of the plaintiff's claim, and as hold the property acquired subject to his lien therefor."

James *vs.* Cowing, 17 Hun, 256.

In this case the plaintiff was a bondholder. The judgment against another defendant was reversed in 82 N. Y., 449, on the ground of the failure of the trial Judge to find whether the plaintiff did or did not agree to join in the new organization. But, on the point stated, the decision was not reversed. To the same effect is

James *vs.* R. R. Co., 6 Wallace, 752.

Representations very similar to those alleged in the complaint were held to constitute a fraud, and consequently to avoid a decree and subject the parties taking title under it to the liability to account to the plaintiff in

Bailey's Appeal, 96 Penn., 253.

In that case the plaintiff was a stockholder in the company, whose assets were taken by the defendants under the decree complained of.

Seventh.

Misjoinder Causes of Action.

There is no misjoinder because there is but one cause of action. The nature of that has been stated. The fact that the sixth prayer for relief asks for a money judgment against the fraudulent conspirators does not make the action one at law. If before the decree they should alien to *bona fide* purchasers all the 8,000 acres upon which Wells had the first lien, this money judgment would be appropriate. When equity acquires jurisdiction, but the parties have so conducted themselves that specific relief cannot be given, it will retain the suit for the purpose of awarding relief in damages.

Sternberger *vs.* McGovern, 56 N. Y. Rep., 12.
Cathcart *vs.* Robinson, 5 Peters, 264.
McCalmont *vs.* Lawrence, 1 Blatchf., 232.

This would be analogous to what was done by this Court in Boone *vs.* Chiles, 10 Peters, 177, 230. In that case some of the land which Chiles had acquired in fraud of the plaintiff's rights he had conveyed to *bona fide* purchasers, and they were decreed to pay to the plaintiff any sums remaining unpaid upon their purchase money.

The complaint is not multifarious as to any of the defendants.

"Multiplicity of suits should be avoided by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts."

Gaines *vs.* Chew, 2 Howard, U. S., 619, 642.
Oliver *vs.* Piatt, 3 *Ibid.*, 333.
DeForest *vs.* Thompson, 40 Fed., Rep. 375.

The complaint in this case is similar to that in James *vs.* R. R. Co., 6 Wallace, 752, in which case the parties committed a fraud by means of a sale. They then contrived to form a new company to which the property of the old company was conveyed. The new company and the persons committing the fraud were the defendants.

Eighth.

Jurisdiction of Subject Matter.

The Supreme Court of New York had jurisdiction of the subject matter of the suit.

This is, so far as the Canal Company is concerned, to enforce a trust, implied by law from the circumstances under which the defendant Company became seized of the legal title to the 8,000 acres, part of which it has since sold to *bona fide* purchases. Such an action is maintainable in a Court of equity, which acts wholly *in personam*, although the land to which the trust relates is situate in another jurisdiction.

Massie *vs.* Watts, 6 Cranch, 148.
Cole *vs.* Cunningham, 133 U. S., 107, 117.
Briggs *vs.* French, 1 Sumner, 504.
Gardner *vs.* Ogden, 22 N. Y., 327.
Penn *vs.* Lord Baltimore, 1 Vesey, 444.
Atlantic & Pacific Tel. Co. *vs.* Baltimore and Ohio R. R. Co., 14 Jones & Spencer (46 N. Y. Superior Ct.), 377.

If the New York Supreme Court had jurisdiction, the Circuit Court to which the suit was removed equally possessed it.

Gaines *vs.* Fuentes, 92 U. S., 10.
Arrowsmith *vs.* Gleason, 129 U. S., 86.

Ninth.

Lapse of Time.

The plaintiff has not lost the right to bring this bill by reason of lapse of time. The bill of complaint alleges, section 36 (p. 16), that knowledge of the making and entry of the decree of February 12, 1877, was first acquired by Wells, who was feeble in body and mind, and by his trustee, Gilbert, in the month of May, 1879, and that it has been difficult and required much time to ascertain the facts in regard to the fraud.

This suit was commenced February 7, 1884 (Summons, p. 1). The suit, therefore, being an action to procure a judgment other than for a sum of money, on the ground of fraud, was brought within six years after the discovery of the facts constituting the fraud, and was, therefore, commenced within the time limited by the Statute of New York in such cases. This is as follows:

"Within six years: An action to procure a judgment other than for a sum of money, on the ground of fraud, in a case which, on the thirty-first day of December, 1846, was cognizable by the Court of Chancery. The cause of action, in such a case, is not deemed to have accrued until the discovery, by the plaintiff, or the person under whom he claims, of the facts constituting the fraud."

N. Y. Code of Civil Pro., Sect. 382, Subd. 5.

If, therefore, this Court should follow the analogy of the State Statute, the bill was filed within the proper time. In that class of cases in which Courts of equity exercise their own peculiar jurisdiction, the rule is that they do not consider themselves bound by the statutes of limitations as obligatory law, but should apply them by way of analogy, unless injustice will result from so doing.

Badger *vs.* Badger, 2 Cliff., 137.
Sullivan *vs.* Portland & Kennebunk R. R., 4 Cliff., 212.
Etting *vs.* Marx, 4 Fed. Rep., 673.
Chewett *vs.* Moran, 17 Fed. Rep., 820.

In that class of cases in which Courts of equity exercise concurrent jurisdiction, the rule is that they consider themselves bound by the statutes of law and equity which govern all demands sued in Courts of law.

Wagner *vs.* Baird, 7 How., 234.
Bank of U. S. *vs.* Daniel, 12 Pet., 32.

If this be regarded as a case of trust, such cases being purely of equitable cognizance, lapse of time is no absolute bar to a suit for relief theron, but each case depends upon its own nature and circumstances.

Manning *vs.* Hayden, 5 Sawy., 360.

Tenth.

The Order made on the Petition of James H. Gilbert was no bar to this Original Bill.

I.—The denial of a motion to open a fraudulent and collusive judgment is not under any circumstances a bar to an original bill to set it aside on the ground of fraud and collusion. It does not preclude a Court of equity from reconsidering the question.

Simpson *vs.* Hart, 14 Johns., 63.
Wistar *vs.* McManies, 54 Penn State, 318.
Truett *vs.* Wainwright, 4 Gilm., 418.
Rollins *vs.* Henry, 84 N. Car., 569.
Bond *vs.* McNider, 3 Ired. Eq., 440.
Schrauth *vs.* Dry Dock Savings Bk., 86 N. Y., 390.
Metropolitan El. R. Co. *vs.* Manhattan R. Co., 14 Abb., N. C., 103.

An order denying a motion to set aside a judgment is nor bar to a subsequent action to set it aside.

Mather *vs.* Parsons, 32 Hun, 338.
Metropolitan El. R. Co. *vs.* Manhattan R. Co., 14 Abb., N. C., 103, 222.

In Schrauth *vs.* Dry Dock Savings Bank, 86 N. Y., 390, 395, the Court say :

"In any event her unsuccessful motion to vacate and set aside the proceedings could not make them binding upon her. It left them where they were before, with the same force they before had and no more."

II.—Since the adoption of the New York Code it has been held that if a party seeks relief upon a motion, and the Court makes an order of reference, and all parties are heard before the Referee, and examine and cross-examine the witnesses produced, the order made upon the coming in of the Referee's report is a bar to a subsequent action.

Dwight *vs.* St. John, 25 N. Y., 203.

But this rule is expressly limited to the circumstances of that

case. It does not apply where the hearing has been upon affidavits, or where for any reason the merits have not been fully considered and decided in the special proceeding.

Dwight *vs.* St. John, 25 N. Y., 203.
Riggs *vs.* Purcell, 74 N. Y., 370.
Petition of Spelman, 74 N. Y., 448.

III.—This defence should be set up by plea in bar, which should set up enough of the pleadings in the former suit to show that the same matter was actually decided by the Court whose judgment is relied on.

1 Daniel Ch. Pr., 659 *et seq.*
Galloway *vs.* Hamilton, 1 Dana, 576.
Ferguson *vs.* Miller, 5 Ohio, 459.
Child *vs.* Gibson, 2 Atk., 603.

IV.—But the prayer of the petition was denied, because that was not the proper remedy.

The case is in brief this:

By means of a fraudulent decree a colorable title to land is procured by the parties to the fraud. They organize a company and convey the land to it. Some of the land is sold by the company to purchasers for value, without notice.

The relief required is two-fold:

1. To recover from the company the proceeds of the land which it has sold to *bona fide* purchasers.

2. To remove the obstacle to proceedings to foreclose the lien which is created by the fraudulent decree.

This relief could not be obtained on petition. The proper scope of a petition is to set aside a decree or sale for irregularity, or as matter of favor. A party in default or who thinks that a *bona fide* sale has realized an inadequate price may file a petition in which he prays that his default may be opened, or the property resold. Such petition is a part of the proceedings in the suit, and is adapted to correct errors which are not reviewable by appeal, or to obtain relief which is discretionary with the Court. But it is not the proper remedy where the invalidity of the decree and consequent sale arises from actual fraud.

For a like reason it is held that where a decree is entered by

consent, and certain clauses are inserted by mistake, the remedy is by bill and not by petition. (See cases cited under Third Point.) A decree by consent (which the decree in the four cases was represented by the parties obtaining it to be), is no more than an agreement. Any error in it is an error of the parties, and not of the Court. As the old maxim expresses it: *Consensus tollit errorem.* It is therefore necessary that this decree based upon a pretended consent, never, in fact obtained so far as Wells was concerned, should be corrected like other mistakes, or relieved against like other acts of fraud, upon bill filed, and not on petition.

Eleventh.

Wells was not bound by the action of Birdseye, Trustee.

Much stress was laid in the argument below, upon the fact that Birdseye was trustee for Wells, that he took no part in the alleged fraud, and is not a party to this suit. It is claimed that Wells was bound by anything that was binding on Birdseye, and that if Wells had any remedy it was against Birdseye for neglecting his duty to protect Wells.

Support is sought for this contention in sundry decisions, right when applied to the facts upon which they were rendered, but not applicable to the state of facts appearing on the record.

1. The decree sought to be impeached was made in a suit to which Wells was a party individually. He was brought in because of his having an interest distinct from the other bondholders who were represented by Birdseye. In such a case the individual bondholder's interest is not bound by anything that the trustee does or omits to do. The very object of making the individual a party is, that he may assert his rights separately and be relieved from the ordinary presumption that the trustee represents the bondholders.

2. Birdseye had, at the time of the decree in question,

ceased to be trustee for Wells. The effect of the clause in the second mortgage before quoted, and of the tender made by Wells, and the release executed by Birdseye, was to divest any interest as trustee which Birdseye previously had, and to subject 8,000 specific acres of land to a lien for $40,000 under the second mortgage. In effect, the mortgage ceased to be from the Company to Birdseye, and became a mortgage from the Company to Wells. Much stress was laid in the Court below upon the admission by Birdseye in the bill to foreclose the mortgage of which he was trustee, that the Receiver's certificates were a lien prior to that of the mortgage (Article 23, p. 8.) This admission, however, ceased to have any effect when Birdseye executed the release to Wells. That expressly declares (p. 62) that the lands described in it are "subject *only* to the encumbrance created by" the Frost mortgage. This is the mortgage of which McCarter subsequently became trusted. If Birdseye could by admission create a lien he could by release discharge it.

But the admission was in violation of Birdseye's duty, unauthorized by the bondholders, and was fraudulent and void (Article 23, pp. 8, 9.) Hollister v Stewart 111 N.Y. 645, 66

3. The non-joinder of Birdseye is not pleaded as a defense. It was therefore waived.

4. If any person could be said to be trustee for Wells after the execution of the release it was Thomas N. McCarter, who was trustee under the third mortgage. He is made a party defendant.

5. The complaint alleges and the demurrer admits that Davis and his associates really did all that was done in Birdseye's name. They undertook to execute his trust, and it is therefore they who must account for their action.

6. Finally the objection shows a failure to appreciate the character of this suit. Its object is to wrest the proceeds of fraud from the hands of certain wrong-doers. If they fraudulently conspired to deceive the Court and obtain a decree to which they were in no wise entitled, and have used this decree to obtain property which belonged to Wells, he can sue for the property or its value. In such a suit he or his representative is the only proper plaintiff.

The wrong-doers who have got the property or its proceeds are the only proper defendants.

Twelfth.

The decree below should be reversed and the case remanded with directions to enter judgment for the plaintiff upon the demurrer with costs.

JOHN CUMMINS,
Attorney for Appellant.

EVERETT P. WHEELER,
Of Counsel.

JAN 5 1892

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 149.

ANDREW WESLEY KENT, EXECUTOR AND TRUSTEE OF JONATHAN TREMAINE WELLS, DECEASED,

Appellant,

vs.

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY; THEODORE M. DAVIS, AND THEODORE M. DAVIS AS RECEIVER OF THE OCEAN NATIONAL BANK OF NEW YORK; J. BOORMAN JOHNSTON, ET AL.

BRIEF FOR DEFENDANTS.

JNO. E. PARSONS,
Of Counsel.

C. G. Burgoyne, Walker and Centre Sts., New York.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1891.

No. 149.

KENT, Executor of Wells,
Appellant,

AGAINST

THE LAKE SUPERIOR SHIP CANAL,
RAILWAY & IRON CO. ET AL.,
Respondents.

Brief for Defendants.

Appeal by the complainant from a decision of Mr. Justice Blatchford, sitting as Circuit Judge for the Eastern District of New York, sustaining demurrers to the bill of complaint.

The object of the suit, which was removed from the State Supreme Court of New York, was to defeat three adjudications of the Circuit Court of the United States for the Eastern District of Michigan.

The claim of the plaintiff was that Wells, his testator, was a holder of mortgage bonds of the Portage Lake and Lake Superior Ship Canal Company, predecessor in title of the defendant company, and that by an agreement made in pursuance of the terms of the mortgages he was interested in 8,000 acres, part of the mortgaged premises. He asked that he might be adjudged to have a first lien to the amount of $80,000 and interest on 8,000 acres. He also asked that the defendants might be adjudged to pay him the $80,000 and interest.

The premises were sold under an omnibus decree entered in suits to foreclose four mortgages upon the premises (*Vide* Decree, pp. 64

et seq.). To one suit Wells was a party. To that suit and to others the trustees of his mortgages were parties. The decree in direct terms adjudicated against Wells' claim (fol. 113). The sale of the lands under the decree was confirmed. Long afterwards the plaintiff moved to set aside the proceedings. His application was denied, Mr. Justice STANLEY MATTHEWS holding the Court.

Thereafter the plaintiff brought this suit to get rid of the effect of these three adjudications. His complaint sets forth a great many acts of a legitimate and legal character, which he calls fraudulent. He does not state facts which show fraud. Some of the defendants answered, denying explicitly all charges of fraud, etc.; others demurred, insisting that the Court had no jurisdiction; that no cause of action was alleged; and that the plaintiff had improperly joined to a cause of action for damages (law) one for equitable relief (equity). Subsequently the answering defendants withdrew their answers (p. 95) and demurred (p. 96).

The facts are complicated. The following statement is intended to state only what are material:

The mortgaged premises consisted of three parcels, each of 200,000 acres, granted by Congress.

The Portage Lake and Lake Superior Ship Canal Company was organized on July 6, 1864. On July 1, 1865, it executed the first mortgage, called the Sutherland mortgage, of the first 200,000 acres to secure $500,000.

On July 1, 1868, it executed its second mortgage, called the Birdseye mortgage, of the second 200,000 acres, and of the equity in the first 200,000 acres, also to secure $500,000. Wells purchased $40,000 of the Birdseye bonds.

On July 1, 1870, the company executed a third mortgage, called the McCarter mortgage, of the equity in the 400,000 acres, to secure $1,250,000 of bonds, $1,000,000 of which became outstanding. Wells became the holder of $40,000 of these bonds.

On May 1, 1871, the company executed a last mortgage of all its property, including the third 200,000 acres (called the Wagon Road Lands), to the Union Trust Company for $3,500,000 of bonds, $1,300,000 of which were issued. The complaint alleges that the several issues of bonds were, to a large extent, hypothecated, only a small portion being sold; that in 1871 and 1872 the company defaulted, and that at that time large amounts of bonds were held by the Ocean Bank, Messrs. J. Boorman Johnston & Co., and Messrs. J. C. Ayer & Co.

The complaint further alleges that these bonds were held as collateral to loans which "were of doubtful legality;" that "it was claimed by said company that the bonds pledged as security for said loans were issued unlawfully and in violation of the laws of Michigan."

In December, 1871, the Ocean Bank failed. The defendant Davis was appointed its Receiver. It held bonds under all the mortgages; some were owned by it, "but," the complaint says, "by far the larger part were held as collateral to loans of the character charged" previously.

In 1872 the parties interested in the bonds retained Alfred Russell to protect their interests. Russell was afterwards retained by the trustees of the several mortgages to foreclose them. The complaint alleges that his employment was "by the procurement of Davis, Johnston & Co., and Ayer & Co., and in their interest, without reference to the interests of the other bondholders under said mortgages, and it was agreed between them and the said trustees that said foreclosure suits were to be prosecuted under their directions and for their special benefit, and to this end they indemnified the trustees," etc. This simply means that the owners of a part of the bonds assumed the expense of foreclosures which must inure to the benefit and should have been at the expense of all holders.

On May 25, 1872, a bill was filed to foreclose the Sutherland mortgage. Birdseye, Wells' trustee, was made a defendant. On June 13, 1872, Isaac H. Knox was appointed Receiver. On June 17, 1872, an order was made for Receiver's certificates, to be a first lien. The order authorized the certificates to be sold at a discount not exceeding 25 per cent. The bill alleged that Sutherland was a citizen of New Jersey, and that upon the motion for the appointment of a Receiver it was stipulated by the solicitors of Birdseye that Sutherland did reside in New Jersey.

On August 5, 1872, Birdseye, Wells' trustee, answered in that suit, denying that Sutherland resided in New Jersey. One of the claims of the plaintiff is that Sutherland did not really reside in New Jersey, that his testimony did not satisfactorily show that he resided there, and that in consequence the Receiver's certificates were void for want of jurisdiction in the Court. The complaint alleges that $500,000 of the Receiver's certificates were purchased at 75 per cent., the remainder at 60 per cent., and that the certificates were issued "by the procurement and in the interest of said bondholders, and were all purchased and acquired in their interest" for the purposes alleged

in the complaint. There is no allegation that the money was not needed; that it was not properly expended for the benefit of all parties in interest; or that any other parties could be procured to take certificates. Any one familiar with such transactions can see that Wells stood on one side, let the other bondholders do all the work, put up all the money, and then came forward to complain.

On August 27, 1872, the company was adjudicated a bankrupt.

On January 3, 1873, the assignees in bankruptcy, and McCarter, as trustee of the third mortgage, which secured $40,000 of Wells' bonds, were made parties to the Sutherland suit. On July 3, 1872, a bill had been filed by Russell to foreclose the McCarter mortgage; the Canal Company and the Union Trust Company were made defendants. It will be remembered that the McCarter mortgage covered 400,000 acres and the Union Trust Company mortgage covered the whole 600,000 acres.

On January 13, 1873, the assignees in bankruptcy were made parties to the McCarter suit.

On July 5, 1872, Birdseye, Wells' trustee of the other $40,000 of his bonds, filed a bill for the foreclosure of his mortgage; McCarter, trustee of Wells' other bonds, was made a defendant. The bill in that suit set forth the issuing of the Receiver's certificates and recognized them as a paramount lien. The complaint alleges that this "was the trick or device of the agent or counsel of" the holders of the certificates, to obtain title to, and possession of the "entire property of the said Canal Company, and to obtain the payment of all their bonds in fraud" of Wells, &c.

The complaint, for various reasons, questions the right of the proceeding (fols. 18 *et seq.*).

The complaint further alleges that the Birdseye and McCarter mortgages, securing Wells' bonds, provided for releases of lands at the rate of $5 an acre upon surrender of bonds, and that on or about August 11, 1873, Wells, Birdseye, and the assignees in bankruptcy of the company, took such proceedings as to entitle him to a release of 8,000 acres from all lien except for Wells' bonds.

In September, 1873, the assignees in bankruptcy filed a bill against the trustees of all the mortgages, Wells, and Frederick D. Tappan who had been made trustee of the Receiver's certificates, praying that the above-mentioned proceedings be declared valid, and to have the legal effect asserted by Wells, and asking that the foreclosures be stayed, that the mortgaged premises be sold upon

terms to be arranged in that suit, and that holders of bonds secured by the mortgages, and of Receiver's certificates be required to prove them, giving to all persons the right to dispute them. Both Wells and Birdseye, his trustee, appeared. Wells stipulated for judgment *pro confesso*.

Issue was joined and a large amount of testimony was taken and filed in the several suits, but the complaint says that "none of the testimony so taken had any bearing whatever upon the effect of said instrument of release, and the validity thereof was admitted upon the record as aforesaid." This simply means that the suit was a collusive suit; neither the company nor its assignees in bankruptcy had any interest. The whole proceeding was a device on Wells' part to thwart the holders of the certificates, the holders of prior bonds, &c.

The suit, however, was important in this: that Wells himself was a party; both Birdseye and McCarter, his trustees, were parties; and all the other parties in interest were parties, including the Union Trust Company, as trustee of the last or 600,000 acres mortgage (fol. 19). The pleadings raised the very question which the plaintiff desires now to litigate; and the suit also gave to Wells an opportunity of having determined by the Court the mode in which the property should be sold.

The complaint alleges that late in 1876 or early in 1877 "Russell, as the solicitor of Johnston & Co., Ayer & Co., and Davis, entered into a fraudulent conspiracy for the purpose of procuring from the Circuit Court the entry of a decree by means of which the interest of the said Jonathan T. Wells in said 8,000 acres of land should be divested and the value of his said bonds destroyed and the entire property and assets of said company vested in the parties above named to the exclusion of Wells." The "conspiracy" is then set forth (fol. 21).

It consists in calling fraudulent a series of most appropriate and necessary transactions, the gist being that the parties who held the bulk of the bonds and all the Receiver's certificates, and whom Wells was trying to baffle, combined for the purchase of the property under the omnibus decree entered in all the suits, including a suit (fols. 101-108) brought for the foreclosure of the Union Trust Company mortgage of the 600,000 acres, and the assignees in bankruptcy suit to which Wells was a party and which was in his interest.

The complaint alleges that on February 12, 1877, Russell obtained from Judge EMMONS, "who was then seriously sick and

confined to his house," an order that all the causes be heard upon the pleadings and proofs in all the causes and at the same time obtained a decree which adjudged that Wells' attempt and proceedings were ineffectual.

The complaint alleges that the order and decree were procured "secretly and without notice to the said Jonathan T. Wells or to his said solicitor. The said Judge was induced to sign the said decree upon the representations that said decree was entered merely for the purpose of a sale of the property so as to pay everbody; said decree, though purporting to be entered upon proofs, and after a hearing, in reality paid no regard or attention to the pleadings in said suits or to the proofs," etc.

The plaintiff alleges that said decree was not a judicial determination of the rights of all parties, but was a contrivance to enable the parties to the aforesaid "conspiracy" and "fraudulent agreement" to get possession of the property, etc.

The complaint alleges "that the property was insufficiently advertised, and that it was sold in bulk; that knowledge of the decree was purposely kept from Wells, and that the adjudication against him was wholly unwarranted by and contrary to the pleadings and proofs."

Wells died on October 16, 1881, at the age of eighty-two years.

The complaint alleges that for the preceding three years he was unable to give personal attention to his interests, and that on March 14, 1879, he made an assignment to James H. Gilbert, in trust for the benefit of himself and his legal representatives; that knowledge of the decree was first acquired by Wells and Gilbert in May, 1879, and that it was exceedingly difficult, and required much time to get at the facts.

The complaint then alleges that on March 10, 1882, a petition was filed in the U. S. Circuit Court, on behalf of Gilbert for relief against the decree; that the application was heard before Mr. Justice STANLEY MATTHEWS and denied. The complaint alleges that the denial was without prejudice to the merits of the application or proceedings to be taken thereafter in the interest of the estate of said Jonathan T. Wells. This does not mean that Judge MATTHEWS' order was qualified in any way. It was an absolute denial of the application.

The plaintiff on the hearing below claimed that Justice MATTHEWS said something to the effect that his order could not prejudice any rights which the plaintiff could assert by suit. The defendants contend,

and the plaintiff was of that opinion, that his only course for relief, if he were entitled to any, was to apply to the Court by which the decree and the several orders complained of were made; that he did so, and that having been beaten, an additional adjudication adverse to him has been made.

The complaint further sets forth that the premises were sold by the Master in an improper way; "fraudulent" is the term used. The grievance is, that applications for delay were refused, and that the other parties would not go to expense for advertising for Wells' benefit, and that the sale was in disregard of a protest by Wells, and that the terms of the sale were onerous and violated the decree.

The complaint then sets forth that the premises only realized $550,000; were paid for in Receiver's certificates; and that the "parties to said conspiracy" and Russell procured the Master's report of sale to be filed by misrepresentation, and that they obtained an order confirming the sale irregularly and by misrepresentation; the "misrepresentation," however, being in respect of matters which did not concern Wells.

The complaint then alleges that a new company, the defendant The Lake Superior Ship Canal, Railway, and Iron Company, was organized; that the premises were conveyed to it; that by reason of the fraudulent contrivances pleaded, the legal title of the 8,000 acres was divested, and that the plaintiff is without remedy unless "he can set aside the said fraudulent decree, under color of which defendants have acquired their title to said property."

The plaintiff asks this and other equitable relief, and he also asks a personal judgment for his $80,000 and interest.

The defendants contend for the following propositions:

First.

The plaintiff must elect whether he will go for his 8,000 acres of land or whether he will proceed upon the idea that he has lost the land, and that the defendants are liable to him for $80,000

with interest as damages. He could not do both in any Court; *a fortiori*, he could not do it in the Circuit Court, where the modes of trial and of taking testimony are *sui generis*.

Walker vs. Powers, 104 U. S., 245.
Scott vs. Neely, 140 U. S., 106.
Wilkinson vs. Dobbie, 12 Blatchf., 298.

Second.

Any right which Wells ever had was lost by laches and acquiescence.

It appears that Wells was before the Court by his solicitor; he was bound by the knowledge of his solicitor. That knowledge was his knowledge. A principal is affected with notice of all facts of which notice can be charged upon his attorney.

Smith vs. Ayer, 101 U. S., 320.

Avery, Wells' solicitor, is conclusively presumed to have had knowledge of the state of the record and of the entry of the decree; and so Wells must have had knowledge of the decree when it was entered in 1877, although he states in his complaint that he did not have knowledge of it until May, 1879. But whether he waited six years or four years makes little difference; the delay has been so long and such changes have taken place in the condition of the property that if this suit be regarded as a bill in equity the claim is stale.

Every case is governed by its own circumstances. Sometimes one analogy of the Statute of Limitations is applied, sometimes another; sometimes a longer, sometimes a shorter period than that fixed by the statute is sufficient to bar the suit; and sometimes equity will refuse relief where no statutable bar exists.

Harwood vs. R. R. Co., 17 Wall., 78, 81.
Sullivan vs. Portland, etc., R. R., 94 U. S., 806, 811.
Allore vs. Jewell, 94 U. S., 506.
Godden vs. Kimmell, 99 U. S., 201.
Richards vs. Mackall, 124 U. S., 183.
Brown vs. Lake Superior Iron Co., 134 U. S., 530, 534–5.
Société Foncière vs. Milliken, 135 U. S., 304, 308.

Mackall vs. Casilear, 137 U. S., 556, 566.
Campau vs. Van Dyke, 15 Mich., 371.
Russell vs. Miller, 26 Mich., 1.
Hawley vs. Jelly, 25 Mich., 94.
German-American Seminary vs. Kiefer, 43 Mich., 105.

The decree was rendered February 12th, 1877; this complaint was filed February 7th, 1884; almost seven years intervened. No impediments are stated in the complaint to have prevented an earlier prosecution of the claim, or a proceeding at any rate as early as March, 1879, when, according to the complaint, Wells and his trustee, Gilbert, first had actual knowledge of the decree.

Wells, indeed, is stated to have been feeble, but Gilbert, his trustee, was, so far as appears, able-bodied, and yet he waited till March 10th, 1882, before he went into court in Michigan, in the cause itself. At that date certainly the facts were known, and yet nearly two years elapsed after that before this complaint is filed.

It is held in the Campau and Allore and Mackall cases, and in the German-American Seminary case above cited, that where by reason of the death of persons who, from the nature of the case, must have been best acquainted with the facts, a complete presentation of them has become impossible, a bill will be dismissed as not brought within a reasonable time. It appears from the complaint that Judge EMMONS, Mr. Norrie Senior, J. C. Ayer, and perhaps others as well as Mr. Wells himself have died since the decree of 1877, and it is evident that their testimony would be of great value to the defendants. It is doubtless true that statutes of limitation do not apply to express and continuing trusts, which are not cognizable of law, but only in equity, but the case in question does not fall within the above classes of trusts.

Third.

If the general demurrer for misjoinder of causes of action is not sustained, the complaint must be treated as asking equitable relief with damages in the alternative. On that basis it is defective because it appears that there is an adequate and complete remedy at law. The complaint does not allege that any particular 8,000 acres of land is subject to the plaintiff's alleged lien. It does not allege

any insufficiency of responsibility of the defendants. Equity will not disturb vested interests, particularly where third persons (strangers) are concerned, when complete indemnity is furnished by a money judgment.

German-American Seminary vs. Kiefer, 43 Mich., 105.
May vs. LeClaire, 11 Wall., 236.
Grand Chute vs. Winegar, 15 Wall., 373.
Buzard vs. Houston, 119 U. S., 347, 351–2, and cases cited.
Scott vs. Neely, 140 U. S., 106 and cases cited.

Fourth.

The mortgaged premises are in Michigan. Neither the New York Supreme Court nor the Circuit Court as its successor (by transfer) could adjudicate a lien upon it. The case is quite unlike that of the enforcement of contracts respecting foreign real estate.

Fifth.

The plaintiff's claim has been directly adjudicated against him. What he contends is:

(a) That the decree was wrong.

(b) That the sale was wrong.

The Circuit Court held otherwise. His only remedy is by motion to that Court or by appeal.

Armory vs. Armory, 3 Biss., 266, and cases cited.
Blossom vs. R. R. Co., 1 Wall., 655.
Christmas vs. Russel, 5 Wall, 290, 305.
Michaels vs. Post, 21 Wall., 398, 427, and cases cited.
Graham vs. B. H. & E. R. R. Co., 118 U. S., 161, 177–9.
Hefner vs. N. W. Life Ins. Co., 123 U. S., 747, 757.
Central Trust Co. vs. Seasongood, 130 U. S., 482, 492.
Leavenworth vs. Chicago, etc., R'y Co., 134 U. S., 688, 702, 708.
Robinson vs. Iron Ry. Co., 135 U. S., 522, 531–2.
New Orleans vs. Gaines Adm., 138 U. S., 595, 607, 612, 614.

Sixth.

This is none the less so, that the plaintiff alleges that the decree and orders were fraudulently obtained.

(a) No fraud is alleged; to call a judgment which has been regularly obtained fraudulent and to aver it to have been obtained in pursuance of a fraudulent motive, means nothing.

Fogg vs. Blair, 139 U. S., 118, 127, and cases cited.
McConihay vs. Wright, 121 U. S., 201, 208.

The complaint alleges (fol. 8) that the Ocean National Bank, Messrs. J. Boorman Johnston & Co., and Messrs. J. C. Ayer & Co., were holders of "very large amounts of the bonds;" that in November, 1871, and January, 1872, the Canal Company defaulted in the payment of interest then due upon its several issues of bonds (fol. 8); that bills were filed to foreclose the several mortgages; that an order was made for the issue of Receiver's certificates (fol. 11); that an omnibus decree was made by Judge EMMONS (fol. 22); and that under the decree the mortgaged premises were advertised and sold.

Surely in all this there was no abuse of the power of or imposition upon the Court. The right to a decree and sale necessarily resulted from the facts alleged. At the sale, either any or all bondholders had the right to buy.

Twin-Lick Oil Co. vs. Marbury, 91 U. S., 587, 590–1.
Easton vs. German Am. Bank, 127 U. S., 532, 538.
Robinson vs. Iron Railway Co., 135 U. S., 522.
Kropholler vs. St. Paul, etc., Ry., 2 Fed. R., 302.
Credit Co. vs. Ark., etc., Ry., 15 Fed. R., 46.
See also Allen vs. Gillette, 127 U. S., 589.

The assertion (fol. 9) that there was an agreement between the principal bondholders that the foreclosures were to be prosecuted under their direction and for their special benefit, and that Russell, who was their lawyer, was retained by the trustees of the mortgages as their solicitor to foreclose (fol. 9); the asssertion that the certificates of indebtedness were issued by the procurement and in the interest of the large bondholders, and (fol. 15) that the nominal amount "was illegally and fraudulently increased for the sole purpose of "making the Receiver's debt as large as possible," etc.; the assertion that to obtain the omnibus decree, with its adjudication against

Wells, the large bondholders (fol. 21) "entered into a fraudulent "conspiracy;" and the further assertion (fol. 22) that the decree paid no regard to pleadings or proofs and was not "a judicial de- "termination of the rights of all parties, but *was a contrivance to* "*enable the parties to the aforesaid conspiracy and fraudulent agree-* "*ment to get possession of the property and sell it for their own pur-* "*pose;*" are mere allegations of legal conclusions. Their truth is not admitted by the demurrers.

Fogg vs. Blair, 139 U. S., 118, 127. Mr. Justice HARLAN there says:

"As he [the plaintiff] impugned the good faith of the transaction between the company and the contractors, it was incumbent upon him to state the essential, ultimate facts upon which his cause of action rested, and not content himself with charging, generally, that what was done was "colorable," a "fraud," "a breach of trust," and a "scheme" by which Blair and Taylor were to get the stock without paying for it. These are allegations of legal conclusions merely, which a demurrer does not admit. *Dillon* v. *Barnard*, 21 Wall., 430, 437; *United States* v. *Ames*, 99 U. S., 35, 45; *Pullman Palace Car Co.* v. *Missouri Pacific Railway*, 115 U. S., 587, 596; *Ford* v. *Peering*, 1 Ves. Jun., 72, 77."

Richter vs. Jerome, 123 U. S., 233. That was a bill in equity filed by Richter as the holder of (p. 240) 230 of the 1,300 Union Trust Company bonds. It contained very much much the same complaints as those in the present bill. The same bondholders are charged with being conspirators. The conspiracy alleged is substantially the same, *i, e.*, that the motive of the conspirators was to acquire the mortgaged premises, and that Russell, who foreclosed the mortgages, was their lawyer. A demurrer to the bill having been sustained, the case came by appeal to this Court. The opinion was delivered by Chief-Justice WAITE. The Court said (p. 246):

"All the rights the bondholders have or ever had in the mortgage, legal or equitable, they got through the Trust Company, to which the conveyance was made for their security. As bondholders claiming under the mortgage, they can have no interest in the security except that which the trustee holds and represents. If the trustee acts in good faith, whatever binds it in any legal proceedings it begins and carries on to enforce the trust, to which they are not actual parties, binds them *Kerrison* v. *Stewart*, 93 U. S., 155, 160; *Corcoran* v. *Chesapeake, &c., Canal Co.*, 94 U. S., 741, 745;

Shaw v. *Railroad Co.*, 100 U. S., 605, 611. Whatever forecloses the trustee, in the absence of fraud or bad faith, forecloses them. This is the undoubted rule. * * * All the rights which the Trust Company, as trustee, had in the lands at the time of the mortgage passed to the purchaser at the sale. That sale, it is conceded, binds the Trust Company as trustee, and therefore it binds the complainant as a bondholder. If the decree or the sale under it was in fraud of the rights of the bondholders, their remedy is by a direct proceeding to set aside the sale or the decree, and to proceed anew with another foreclosure of the mortgage, and not to undertake to re-foreclose what had been foreclosed before under a decree which remains in force."

Any claim that, because the counsel of the principal bondholders (Mr. Russell) acted as lawyer for the trustees of the mortgages, there was a right to impeach the decree or sale was apparently regarded by the Court as unworthy of consideration. It is to be kept in mind that the bill contains no charge that either McCarter, the trustee of $40,000 of Wells' bonds, or Birdseye, the trustee of the other $40,000, was guilty of any fraudulent or improper conduct.

(b) The plaintiff's complaints are two-fold—first, in respect of matters which happened prior to the decree; those he either did insist upon or he could have insisted upon; in either case he is cut off.

United States vs. Throckmorton, 98 U. S., 61.

(c) Those which relate to the sale. He either did use or could have used them on the motion to confirm the report of sale. In either view he is cut off.

(d) He alleges that the order confirming the sale was without notice to him or his solicitor. This Court has no jurisdiction to give relief against such an irregularity. It must be assumed that relief would be given by the Michigan Circuit Court.

Blossom vs. R. R. Co. *(ante)*.

Seventh.

Nor is the adjudication upon the plaintiff less binding because of his allegation that the Michigan Circuit Court had no jurisdiction of the Sutherland suit for the reason that Sutherland was not a resident of New Jersey, and that the Court erred in holding that he was.

(a) There was an issue and testimony upon that subject.

If the decision were erroneous the remedy was by appeal by Birdseye, the trustee of Wells' bonds.

The jurisdiction attached on filing a bill sufficient in form and with proper averments as to citizenship. They were controverted. They may or may not have been true, but their truth or falsity was necessarily involved and determined by the exercise of jurisdiction in the cause. The fact of citizenship was necessarily found in favor of the averment. The record cannot be collaterally attacked by a second trial of the question of citizenship upon parol evidence.

Freeman on Void Judicial Sales, Sec. 14, p. 33 (3 Ed.), cas. cit. in notes.

Indeed, the Supreme Court of the United States went to the length of holding in Marshall's day that the judgments and decrees of the Courts of the United States are binding until reversed, although no jurisdiction be shown from the record.

McCormick vs. Sullivant, 10 Wheaton, 192 (cited and approved in Cuddy Petitioner, 131 U. S., 280, 284–5):

The defendants filed a plea in bar to a bill in equity, which plea set up a decree in a Court of the United States, and a special replication was put in, that the record in the former suit did not allege that the parties were citizens of different States; the replication was held bad.

Erwin vs. Lowry, 7 How., 172:

In this cause it was determined in 1848 that if the record contain proper averments of citizenship to give a Circuit Court of the United States jurisdiction, a title made by the Marshal under the judgment cannot be attacked collaterally by proof that the averments as to citizenship were not true, and so that the Court had not jurisdiction. Lowry sued Erwin in the State Court of Louisiana for six hundred

acres of land, and Erwin defended upon a record from the United States Court in a suit between a citizen of Tennessee and a citizen of Louisiana, and a Marshal's deed. The State Court and the Supreme Court of Louisiana had overruled the defense upon proof admitted outside the record, that the alleged citizen of Louisiana was not such, and the case came here under the 25th Section of the Judiciary Act.

This case was cited and approved in 1870, in *Miller* vs. *United States*, 11 Wall., 268, p. 301, *top*.

See also *Des Moines Nav. Co.* vs. *Iowa Homestead Co.*, 123 U. S., 552.

Mr. Justice CAMPBELL, a very able and learned Judge of the Supreme Court of Michigan, in *People* vs. *Dawell*, 25 Mich. Rep., p. 271, declares the same doctrine. He says:

"There are many cases where the right to implead parties depends on residence, or on some other peculiar qualification, but no authority will permit a judgment to be impeached, on the ground of any want of such qualification. No Court of the United States, for example, had any jurisdiction over ordinary controversies between citizens of the same State, or between any but aliens and citizens, or citizens of different States, and a judgment will be reversed on error where the jurisdictional facts are not averred (*Jackson* vs. *Ashton*, 8 Pet. R., 148). But the question of citizenship cannot be raised in any collateral proceeding, or in any way, except by a regular objection in the ordinary course (*Erwin* vs. *Lowry*, 7 How., 172; *Wickliffe* vs. *Owings*, 17 How., 47)."

Indeed, I am of the opinion that unless the objection to the citizenship be taken by plea, and before answer, the question is forever closed in the case itself, and *a fortiori* in any collateral proceeding.

D'Wolf vs. Rabaud, 1 Peters, 476, 498.
Evans vs. Gee, 11 Peters, 80.
Livingston vs. Story, 11 Peters, 351.
Smith vs. Kernochen, 7 How., 198.
Sheppard vs. Graves, 14 How., 505, 512.
Wickliffe vs. Owings, 17 How., 47.
De Sobry vs. Nicholson, 3 Wall., 420, 423.

These cases settle that the question is not open at a hearing on the merits.

Undoubtedly Sec. 5 of the Act of 1875 (18 U. S. Stat., 472),

directing the U. S. Courts to dismiss a suit if, *at any time*, a want of proper parties should appear arose from these decisions.

The complaint, in the present case, shows that Birdseye, Wells' trustee, took the objection by *answer*. He thus waived the objection, which under the above cases, the burden was on him to take and prove, and the question was forever closed. Wells, his benficiary, is bound by his action. It is not necessary to cite cases to this.

The familiar doctrine in *Grignon's Lessee* vs. *Astor*, 2 How., 318, has been repeatedly followed, particularly in *Florentine* vs. *Barton*, 2 Wall., 210, 216, in *Mohr* vs. *Manierre*, 101 U. S., 417, 424, and in *Simmons* vs. *Saul*, 138 U. S., 439.

See, also,

Galpin vs. Page, 1 Sawyer, 309, 325, top.
Galpin vs. Page, 18 Wall., 350.
Roderigas vs. East River Savings Institn., 63 N. Y., 460 (1876).

The case of *Thompson* vs. *Whitman*, 18 Wall., 457 (1873), contains nothing which overrules the previous decisions of the Supreme Court above cited with reference to attacking collaterally the jurisdiction of the Federal Courts in respect to citizenship. The question in the cause was as to the *place* of seizure of a vessel in a forfeiture case. The disputed record was from a State Court, and alleged a locality, which would give jurisdiction. So far as appears, the proceeding attacked was entirely *ex parte*, and no issue had been formed in the proceeding as to the jurisdictional facts, to the end that they might be passed on by the Court. The only point actually decided is stated on page 469, 2d paragraph from the bottom. All general language is to be referred to the particular facts in the case. This decision merely follows the opinion of Marshall, in the seizure case of *Rose* vs. *Himely*, 4 Cranch, 240, that whether the *res* was so situated as to be the subject of jurisdiction may be inquired into collaterally. The scope of the case is well illustrated by *Knowles* vs. *The Gas Co.*, 19 Wall., 58, where it was held that in an action on a judgment rendered in another State, an *ex parte* return of the Sheriff that the defendant was personally served, a matter about which no issue had been formed and no controversy had, might be attacked.

See also, Hill vs. Mendenhall, 21 Wall., 453.

On the foregoing authorities, an allegation of the jurisdictional fact of citizenship, which must be made and proved if objected to by plea, is *res ajudicata* and binding in collateral proceedings. See further

Thompson vs. Tolmie, 2 Pet., 157.
Ex parte Watkins, 3 Pet., 193.
Rhode Island vs. Mass., 12 Pet., 657.
Griffith vs. Bogert, 18 How., 158.
Comstock vs. Crawford, 3 Wall., 396, approved in Simmons vs. Saul, 138 U. S., at p. 452.
Dyckman vs. The Mayor, 5 N. Y., 434.
Jackson vs. Crawford, 12 Wend., 533.
Fisher vs. Bassett, 9 Leigh., 119.

But in any view of the case Wells cannot be heard to take the objection. He had his day in Court and appeared by his solicitor. Not only that, but he was chargeable in that suit with actual notice of the Sutherland suit and the Birdseye suit, and he had a right to intervene in both those suits and take an appeal.

Ex parte Jordan, 94 U. S., p. 248.

The complaint nowhere alleges that Wells was ignorant of Birdseye's doings, and if he was aware of them, which is to be presumed in the absence of any such allegation, he might have intervened himself in the Birdseye suit as a bondholder.

It should be added that where the Court has jurisdiction of a mortgagor, subsequent incumbrancers or any other persons may be made parties, or may intervene to assert their rights (for one is the correlative of the other), without reference to the citizenship of the parties. If, being made defendants, they appear and set up claims to the fund, they become actors as well as defendants and waive any immunity from suit.

Freeman vs. Howe, 24 How., 450, 460.
Buck vs. Colbath, 3 Wall., 334, 345.
Jones vs. Andrews, 10 Wall., 327, 333.
Campbell vs. R. R. Co., 1 Wood R., 368.
Clark vs. Barnard, 108 U. S., p. 447.

See also

Forbes vs. R. R. Co., 2 Woods R., 323.
Minn. Co. vs. St. Paul Co., 2 Wall., 609, 632.
Thom. Wire Hedge Co. vs. Fuller, 122 U. S., 535, 542.
Dewey vs. West Fairmont, etc., Co., 123 U. S., 329, 333, top.
Gumbel vs. Pitkin, 124 U. S., 131, 144–6.

The principle seems to be that the Court having acquired the right to administer a trust fund, may entertain a litigation between any parties interested therein.

(b) But it is unimportant whether or not the Court had jurisdiction of the Sutherland suit. The trustees of the other mortgages and Wells himself were parties to the subsequent consolidated suit, and all were bound by the omnibus decree; and by the sale under that decree.

Eighth.

The complaint makes no case against the title of the Lake Superior Ship Canal Railway and Iron Company.

If either of the defendants has wronged Wells, the plaintiff must pursue his remedy at law against such defendant. What he seeks is the recovery of a money claim. It does not appear that he cannot obtain it at law of the alleged wrongdoers.

The complaint contains no allegations upon which to claim that indemnity to the plaintiff requires that the title of the company shall be upset.

The purchasers at the sale under the omnibus decree were Man and Wilson. The price was $550,000. They paid in Receiver's certificates (Complaint, p. 25).

Man and Wilson conveyed to the company. The complaint charges notice to the company (fol. 78).

This did not prevent the acquisition by the company of the title of Man and Wilson with all its rights.

It has always been the rule that where a judgment has been obtained by fraud acts performed under it are valid, and that so far as the rights of third persons are concerned they are precisely the same whether the judgment was obtained by fraud or fairly.

Simms vs. Slacum, 3 Cranch, 300, 306, 307.

Man and Wilson are not parties to the suit. They are not alleged to have participated in the fraud or to have had notice of any fraudulent procedure.

It is a rule nowhere disputed that third persons purchasing at a

sale made under the authority of a judgment or decree acquire rights which no subsequent reversal and no fraud in obtaining the judgment can impair.

Freeman on Judgments, Sec 484 and cases cited.
Beauregard vs. New Orleans, 18 How., 497, 502, and cases cited.
McGoon vs. Scales, 9 Wall. Rep., 23, 31.
South Fork Canal Co. vs. Gordon, 2 Abb. U. S., 479, 487.

It may well be doubted whether the company (the grantee of Man and Wilson) is affected by the alleged fact that the persons who were parties to the pretended fraud constituted its stockholders.

See the following cases :

Beal vs. Chase, 31 Mich., 490, 531 bottom.
The Key City, 14 Wall., 660.
Blake vs. B. C. R. R., 56 N. Y., 485.
U. P. R. R. vs. Durant, 3 Dill. C. C., 343.
Fletcher vs. Titusville Gas and Water Co., 8 Phil. Rep., 559.
G. C. & S. R. vs. Kelly, 77 Ill., 426, 435.
Ranger vs. G. W. R. R., 5 H. L. Cas., 72, 87.
N. B. & C. R. R. vs. Conybeare, 9 H. L. Cas., 711.

Ninth.

The decree in the suit of Birdseye trustee, was a final adjudication in favor of the validity of the Receiver's certificates.

No question can be made of the jurisdiction in that case.

Birdseye, as trustee, represented Wells. Wells and all the other beneficiaries under the Birdseye mortgage were bound by the decree. The complaint does not charge Birdseye with fraud.

If this were claimed, the remedy of Wells would be by action against him for damages. Unless he is alleged to be irresponsible, no remedy can be had in equity.

The complaint cannot be regarded as a proceeding to set aside the Birdseye decree. Birdseye is not a party. To such a suit, charging him with fraud, it would be necessary to join Birdseye.

It is clear upon the allegations of the complaint that Birdseye's

action, in consenting to a Receiver and in recognizing the certificates and taking a decree subject to them, was for the benefit of his beneficiaries.

The Supreme Court of the United States has determined that the lands covered by the Birdseye mortgage would have reverted to the United States unless the canal should be finished by the issuance of the Receiver's certificates.

Jerome vs. McCarter, 94 U. S., 734, 738.

See also

Sutherland vs. The Canal Co., 9 Bankruptcy Reg., 298.

At any rate under the relation of trustee and bondholder, Birdseye had a discretion and his exercise of it was within the scope of his powers. Birdseye was bound and so was Wells, because the complaint does not charge that he acted in bad faith.

Kerrison vs. Stewart, 93 U. S., 155.
Shaw vs. R. R. Co., 100 U. S., 605.
Richter vs. Jerome, 123 U. S., 233 (a suit in relation to the lands now in controversy).
Pierce vs. Emery, 32 N. H., 484.

In 32 N. H. above, the S. C. of N. H. held that the trustees were bondholders, might assent to a prior lien, and their assent would bind the bondholders. On the principle of that case Wells is bound by Birdseye's action.

Tenth.

The decree of 1877 determining the priority of the Receiver's certificates binds Birdseye as well as Wells. It has appeared above that Wells was conclusively bound by that decree for the reasons there stated, with respect to his ineffectual attempt to obtain the (8,000) eight thousand acres ; and he is just as fully bound by the provisions of that decree with regard to the paramount lien of the certificates and for similar reasons.

Eleventh.

The sale in bulk, alleged as a fraud in the complaint, was expressly decided to be lawful in the McCarter case above reported in 94 U. S. And it may be here observed that the sale referred to in the complaint, although it does not so appear by the complaint, was had under the McCarter decree as well as under the omnibus decree.

If the sale in bulk had been irregular, Wells' remedy was in the omnibus suit to which both he and his trustees were parties. On March 10, 1882 (fol. 24), nearly five years after the sale (fol. 25) and more than five years after the decree (fol. 21), Wells' trustee applied for relief in that suit and very properly was beaten. He waited two years and then brought this suit to procure a reversal of Judge MATTHEWS by a State Court of New York. Judge MATTHEWS' action is not impugned. His proper course was to renew his application or to appeal.

Twelfth.

In addition to the point made above as to the citizenship of Sutherland, it may be added that it appears by Article 18 of the complaint, that Birdseye *stipulated* the fact of the citizenship of Sutherland at the time of the order for the Receiver's certificates.

Now, (1) clearly this stipulation extended to the entire case, and (2) while consent cannot give jurisdiction, facts giving jurisdiction may be proved by stipulation, and the Courts may act judicially upon them.

Railway Co. vs. Ramsay, 22 Wall., 322, 327.

Referring to the decisive cases above cited that Birdseye's beneficiaries, including Wells, were bound by his action and discretion in doing what was clearly for their benefit unless he acted in bad faith, there is no charge in the complaint that Birdseye acted in bad faith in making that stipulation, and it therefore was binding.

Thirteenth.

The afterthought of the plaintiff, to endeavor to sustain the complaint by reason of its prayer for general relief upon the claim that facts are alleged which impose upon the entire 400,000 or 600,000 acres a trust entitling the plaintiff to share with the purchasing bondholders in the benefits of their purchase, cannot succeed.

After the argument below the plaintiff submitted a reply to the defendants' brief, in which his counsel said:

"Now, assuming for the sake of argument, that the Court should "hold that the matters alleged in the bill respecting the conduct of "the defendants down to and including the decree signed by Mr. "Justice EMMONS are insufficient to entitle plaintiff to relief in this "suit—the allegations being those contained in the first thirty-three "articles of the bill—then it is clear that the allegations of the "thirty-eighth to the forty-second articles, inclusive, are sufficient to "entitle the plaintiff to a decree that he is equitably entitled to par- "ticipate with the Davis party in the purchase made by them, and "in the various transactions by which the land so purchased as "alleged in the thirty-eighth article was transferred to the demur- "ring defendant, as alleged in the thirty-ninth and fortieth articles. "It is clear law that where a trustee buys property at a judicial "sale the purchase is held in equity to be for the benefit of all the "beneficiaries."

Article *38 et seq.* of the complaint, *in support of the claim of the plaintiff to a continuing paramount lien upon the 8,000 acres*, alleges that Russell, in behalf of the purchasing bondholders, induced the Master to fix the earliest possible day for the sale; that certain bondholders (Wells is not alleged to have been one) asked for a special advertisement and adjournment of the sale to enable the other bondholders to combine and form a combination of capitalists to bid at the sale; that a longer adjournment than two weeks was refused, and that the purchasing bondholders refused to specially advertise; that the Master, under the direction of Russell, failed to mention the terms of payment in his notice of sale, and announced at the sale that the payment of the entire bid must be made then and there, "and imposed other onerous and "severe terms and conditions which rendered it practically im- "possible for any one to bid for or to buy the premises," except the so-called conspirators, and also violated the decree by selling

in bulk, and that before thirty days an order confirming the sale was obtained.

Article 40 sets forth the incorporation of the Lake Superior Ship Canal Railroad and Iron Company, and alleges that it "had notice "of the frauds, irregularities, and proceedings set forth in this com- "plaint," and took title to said premises subject to any and all rights of the said Jonathan Tremaine Wells, "as herein set forth."

Article 41 alleges that after the execution of the Birdseye release McCarter "became and was seized of the lands in said release de- "scribed, *i. e.* the 8,000 acres, in fee simple in trust for the said "Jonathan Tremaine Wells, and in further trust" to sell and out of the proceeds to pay Wells his $80,000 and interest; that it was his duty as trustee to cause the lands, *i. e.* the 8,000 acres, to be suitably advertised; to use diligence to prevent the creation of any lien prior to that of Wells; that Davis, Boorman Johnston & Co., and Ayer & Co., took upon themselves the performance of the duties of such trust; that the land at the time of said sale, *i. e.* the 8,000 acres, was reasonably worth at least $150,000; that with reasonable diligence that amount could have been realized; that they became trustees for Wells, and had no right to buy the land; that they did buy it, and caused it to be conveyed to the company, sold a portion to *bona fide* purchasers for value and received the purchase money; and "that they and said company have thus become and are liable "to pay to this plaintiff the full amount due upon the bonds afore- "said, to wit: the sum of $80,000 with interest as aforesaid."

Article 42 alleges that the title was divested, the remedy and right of action of Wells against the original company was destroyed, and that the plaintiff was without remedy unless he could set aside the omnibus decree.

(a) To torture this into the assertion or into allegations upon which to predicate the assertion that as to 400,000 acres or 600,000 acres the purchasing bondholders became trustees for Wells, requires an amount of ingenuity which is certainly worthy of all praise. It involves the necessity of shutting the eyes to what is alleged and by some process of second sight of seeing in the allegations what is nowhere stated.

The beginning and the end of the plaintiff's claim is his assertion of a paramount lien upon 8,000 acres and of his right to remove all obstacles in the way of the enforcement of that lien.

(b) A prayer for general relief only embraces what is germane to the purpose of the suit.

English vs. Foxhall, 2 Pet., 595, at p. * 612.
Eyre vs. Potter, 15 How., at p. 56.
Hayward vs. National Bank, 96 U. S., at p. 614.
Price vs. Berrington, 3 Macn. & Gord., 486, 498–9.
Stevens vs. Guppy, 3 Russ., 171, 185.
Hickson vs. Lombard, L. R., 1 H. L., 324.

(c) If the suit had been brought to impose upon the purchasing bondholders a general trust in favor of Wells, the allegations relied upon would lead to no such result. The plaintiff would be met with the difficulty that any number of bondholders, whether a minority or a majority, little or large, may prosecute a foreclosure; may indemnify for the expense; are under no obligation to spend their money for special advertising whether necessary, desirable, or otherwise; are not required to acquiesce in indefinite adjournments; and at the sale may purchase in their individual interest.

1st Natl. Bank vs. Shedd, 121 U. S., 74, 86.

It may be assumed that their motive is to protect or benefit themselves. Outside bondholders have an equal right to protect or benefit themselves. No responsibility is incurred by either set of bondholders to the other by the exercise of such legal right.

Twin-Lick Oil Co. vs. Marbury, 91 U. S., 587, 590–1.
Easton vs. German Am. Bank, 127 U. S., 532, 538.
Robinson vs. Iron Railway Co., 135 U. S., 522.
Kropholler vs. St. Paul, etc., Ry., 2 Fed. R., 302.
Credit Co. vs. Ark., etc., Ry., 15 Fed. R., 46.
See also Allen vs. Gillette, 127 U. S., 589.

The omnibus decree, to which it has been stated Wells was a party, directs (fol. 114) a sale, provides (fol. 117) that the Master shall give notice of the time and place of sale, "according to the "course and practice of this Court," bars (fol. 119) the Lake Superior Ship Canal Railroad and Iron Company (Wells' mortgagor) and all persons claiming or to claim from and under them, and (fol. 122) permits any of the parties (this includes Wells) to "apply to "the Court upon the foot of this decree for any order or relief which "may be necessary or proper in the premises."

It is difficult to see how a decree could more fairly and fully provide for and protect all parties concerned. Surely Wells could not complain. He did not appeal; he did not apply to the Court

for any relief. There is no allegation that he made any objection to the sale. Apparently he and those who advised him stood by to take the results of the sale if satisfactory, and if not to complain. Equity does not permit this.

Twin-Lick Oil Co. vs. Marbury, 91 U. S., 587, 592.
Wood vs. Carpenter, 101 U. S., 135, 140.
Barnes vs. Chic., etc., Ry., 122 U. S., 1, 18, 20.

Last.

The decree of the Circuit Court should be affirmed with costs.

JNO. E. PARSONS,
For Defendants.

Office Supreme Court U. S.
FILED.
DEC 31 1891
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CLERK

Supreme Court of the United States.

ANDREW W. KENT, as Executor, &c.,
Appellant,

against

THE LAKE SUPERIOR SHIP CANAL AND IRON COMPANY, et al
Appellees.

No. 149.

BRIEF FOR APPELLANT,

In reply to defendants' brief.

STATEMENT.

The attention of the Court is asked to some facts appearing on the record, but not fully stated in the principal brief.

The actual value at the time of the sale of the Canal, of 400,000 acres of land included in the first and second land grants and of 47,958$\frac{55}{100}$ acres of the third land grant (p. 79), can be judged from the agreements marked G and H, annexed to the complaint (pp. 77–90). By these the Davis party undertook to go on and complete the sale of this property. Man and Wilson were to buy it in. A corporation was to be formed with a capital not exceeding $8,000,000, and a bonded debt not exceeding $4,000,000, and Man and Wilson were to convey the property thus purchased to this corporation and receive in payment its entire stock and bonds, which were to be

distributed among the Davis party, to the exclusion of every one else (p. 80). It was also provided that Don M. Dickinson (representing "English Capitalists" p. 77, marg., pag 123), should have the right to purchase the whole property for $\$1,886,251\frac{40}{100}$ (p. 81).

It thus appears that the Davis party valued the property at $\$1,186,251\frac{40}{100}$, over and above the nominal amount of the Receiver's certificates (which amounted to $640,000, Art., 20, p. 7), and they were prepared to capitalise it at twelve million dollars. The capital stock was afterwards reduced to four millions (p. 18).

They took possession of this property, and sold it, and bought it in themselves. Can it be possible that equity will not compel them to account to the bondholders in trust for whom the land was held?

First.

Defendants insist that there are no specific allegations of fraud which would justify a recovery. In reply we refer to the Second Point in the principal brief and recapitulate briefly the allegations of specific fraudulent acts.

1. The admission, on the motion for Receiver's certificates, that Sutherland was a citizen of New Jersey (p. 7).

2. The admission in the Birdseye bill to foreclose the mortgage on the second land grant, that the Receiver's certificates were a lien upon the second land grant (p. 8).

In addition to the cases cited under the Fourth Point of the principal brief, to show that this admission was erroneous, we refer to

American Bridge Co. *vs.* Heidelbach, 94 U. S., 798.

Dugro v. Rich 52 Maine 115

3. The representation by Russell to the Court that the decree which he offered for signature was satisfactory to all parties. On this representation the judgment was signed without any hearing whatever (p. 15).

4. The various acts specifically alleged by which the whole property comprising the canal and 447,958 acres of valuable land was sold for less than the Receiver's certificates (p. 17).

Second.

Defendants claim that Wells was bound by these admissions of Birdseye. Whether he was, must in a large measure depend upon whether those admissions were fraudulent or not. The complaint alleges that they were fraudulent, and that though made nominally by Birdseye, they were really made by the defendants, who represented Birdseye and acted in his name, and that they were made for the purpose of obtaining the whole property of the company for themselves to the exclusion of the other bondholders (pp. 8, 9). This was a fraud.

Jackson *vs.* Ludeling, 21 Wall., 616.

Third.

Defendants claim that Wells stood by and allowed other bondholders to conduct the litigation, and that consequently he cannot have redress. The claim presents for adjudication the question of the relation of the trustee of a mortgage to the various holders of bonds secured by it. On this point we contend.

1. Wells had a right to stand by. The proceedings were conducted in the name of his trustee. He was ignorant that there was another power who pulled the strings. The trustee is "bound to protect the interest of the *cestui que trust, without his interposition.*"

Chalmer *vs.* Bradley, 1 Jac. & Walker 51, 67.

2. The trustee owed a duty impartially to all the bondholders.

Sahlgard *vs.* Kennedy, 2 Fed. Rep., 295.

People *vs.* Merchants' Bank, 35 Hun (N.Y.,) 97.

"The trustee represents all the bondholders."
Sage *vs.* R. R. Co., 93 U. S., 412, 417.

3. This is a duty he cannot discharge by delegating its exercise to a portion only of the bondholders and their counsel. If he does so delegate it they become acting trustees, and are subject to all the responsibilities to which he was subject. Some of the authorities on this point are cited on page 21 of the principal brief.

To use the apt language of Chief Justice Gibson: "Equity turns the fraudulent procurer of the legal title into a trustee to get at him."

Church *vs.* Ruland, 64 Penn., 432, 443.
2 Story Eq., § 1265.

We do not deny that a majority of the bondholders can take measures to purchase property for their individual benefit. In many railway mortgages, express provisions are contained to enable the majority of the bondholders to act independently through the medium of a bondholders committee or otherwise. No such provisions were contained in either the Birdseye or McCarter mortgage. In their absence the majority bondholders had two courses open to them.

1. To intervene and be made parties to the suit. In this case they would be under no obligation to any holder of bonds who did not join with them.

2. To indemnify the trustee and take upon themselves the execution of the trust. In the latter case they would be under the same obligation and liability to the other bondholders that the trustee was.

In the present case the bill alleges that the latter course was pursued by Davis and his associates. It is also alleged that instead of acting for the benefit of all the bondholders they excluded Wells and brought in the property for their separate benefit. The right of the plaintiff to claim that such a purchase was in trust for Wells is discussed in the principal brief (Sixth Point).

The case of Easton *vs* German-American Bank, 127 U. S., 532, cited by appellees, illustrates and really supports the proposition contended for by appellant. The Court distinguish

between the case of a pledge and of a trustee under a deed of trust. In the former case he is the vendor at a sale to foreclose the pledge.

"In reference to the pledge and to the pledgor, he occupies a fiduciary relation, by virtue of which it becomes his duty to exercise his right of sale for the benefit of the pledgor. He is in the position of a trustee to sell, and is by a familiar maxim of equity forbidden to purchase for his own use at his own sale."

In the case of a deed to a stranger in trust to sell for the benefit of creditors,

"That stranger, by virtue of the conveyance, held the legal title in trust for the power of sale according to the power contained in it. * * * *The sale was* made under the direction and control *of the trustee*, but as the creditors, who held the obligations of the debtors, were not themselves trustees, there was nothing either at law or in equity, to prevent their being bidders and becoming buyers *at the trustees' sale*."

The allegation in the complaint is, that the sale complained of was not made by the trustee, but by certain persons who took his place and assumed his duties. They, thereupon became subject to his liabilities. They could not purchase for their own use at their own sale.

Robinson *vs.* Iron Railway Co., 135 U. S., 522, was a bill filed by second mortgage bondholders against those who had purchased on foreclosure of a first mortgage. But it contained no offer to redeem, averred no actual fraud, and the sale was made by the trustee and not by the creditors who bought at the sale. In all these respects it differs from the case at bar.

In Allen *vs.* Gillette, 127 U. S., 589, the Court say (p. 596):

"A trustee may purchase at a judicial sale, brought about by a third party, which he had taken no part in procuring, and over which he had no control."

In the case at bar the acting trustees themselves "brought about," "procured" and "controlled" the sale.

Richter *vs.* Jerome, 123 U. S., 233, is erroneously stated, at p. 20 of appellee's brief, to be "a suit in relation to the lands now in controversy." In fact it was a suit in relation to certain

'wagon road lands," which were not included in the mortgage on the second land grant. The Michigan decree was not alleged to be fraudulent. At p. 247, the Court say:

"If the decree, or the sale under it, was in fraud of the rights of the bondholders, their remedy is by a direct proceeding to set aside the sale or the decree, and to proceed anew with another foreclosure of the mortgage."

On another material point the Court say (p. 246):

"If the trustee acts in good faith, whatever binds it in any legal proceedings it begins and carries on to enforce the trust, to which they are not actual parties, binds them."

In the case at bar, it is alleged that the trustee did not act in good faith.

This analysis shows that the decision of the case turns upon the answer to the question—Do bondholders who indemnify a trustee, and act in his place, incur thereby any obligation to the other bondholders?

The seventeenth article of the complaint (p. 6) alleges that the employment of the attorney in Michigan, who conducted the suits, was by the Davis party, "and it was agreed between them and the said trustees that said foreclosure suits were to be prosecuted under their direction and for their special benefit, and to this end they indemnified the said trustees," &c.

Article 26 (p. 10) alleges that the admission of the priority of the Receiver's certificates, as liens on the second land grant, was without notice to the bondholders, and that the trustee knew "that said Russell (the attorney who made the admission) was acting solely in the interest of the said parties whom he represented, to the sacrifice of the interest of all the other bondholders secured under said deed of trust."

On this state of facts what remedy does the law give? There can be but two:

1. To impose upon the parties thus assuming the duties of the trustee, the obligations which the law imposed upon the trustee.

2. To make the trustee liable for damages sustained by the beneficiary.

Ordinarily, in cases of breach of trust, the beneficiary may either follow the property or hold the trustee personally liable.

4 Kent Comm., 307.
Oliver *vs.* Piatt, 3 How., 333, 401.
People *vs.* Merchants' Bank, 35 Hun (N. Y.), 97.

What reason can be assigned for denying to the beneficiary the same right of election in this particular case?

Fourth.

The appellant's case rests upon well settled principles:

1. *Potestas delegata non potest delegari.* The trustee of a railroad mortgage is charged with a trust, involving the exercise of judgment and discretion.

Twin-Lick Oil Co. *vs.* Marbury, 91 U. S., 587, 590.

He cannot delegate the exercise of his discretion.

Knapp *vs.* Troy & Boston R. R., 20 Wall., 117, 123.
Merrill *vs.* Farmers' Loan and Trust Co., 24 Hun, 297.

This rule applies to all trusts.

Lewin on Trusts, 252.
Berger *vs.* Duff, 4 Johns. Ch., 368.
Newton *vs.* Bronson, 13 N. Y., 587.
Wilson *vs.* Tuttle, 36 N. H., 169.

In the case at bar discretion was exercised:

A. Upon the decision whether to seek to make the Receiver's certificates a lien on the second land grant. *Prima facie* it would seem that a first lien on the canal alone should have

been sufficient security for the money necessary to complete it. The issue was $640,000 (Art. 20, p. 7). Bonds to the aggregate amount of $2,250,000 had already been issued (Art. 3, p. 2; Art. 4, p. 3; Art. 7, p. 3). It must be assumed that the construction of the canal, for which these bonds were issued, had progressed far enough to make a first lien upon it valuable. And, in addition, there was the first land grant of 200,000 acres in the upper peninsula of Michigan. These were to be selected "*from any lands* in the upper peninsula of said State, subject to private entry." Act March 3, 1865, 13 Stat. at Large, 520. They "were selected with care and at much expense," and "were regarded as of great prospective value, on account of the rich timber growth and the mineral wealth of that region" (p. 6, Art. 16).

B. In deciding upon the time and place of sale of the canal and land. Whether the sale should be in bulk or in parcels, whether it should be extensively advertised or not, are questions that the trustee should himself decide.

These trusts are expressed in the Birdseye mortgage (pp. 33, 34), and in the McCarter mortgage (pp. 47, 48).

2. In the Birdseye mortgage (p. 37) and in the McCarter mortgage (p. 52) a method is provided by which, in case of the resignation by the trustee, a new trustee may be appointed by "any Judge of the Supreme Court of the States of New York or Michigan." Yet here the trustee undertook in effect to appoint his own successor, which he had no right to do.

Crewe *vs.* Dicken, 4 Ves., 97.
Wilkinson *vs.* Parry, 4 Russ., 272.

In a case where a delegation of discretion would effect a mere economical administration, and where there was no opposition, the Supreme Court of Massachusetts said:

"The agreement involves as one of its elements the absolute and irrevocable surrender by the trustees of the control and custody of the first two funds, and the substitution of other custodians, *and thus violates the letter and spirit of the deed of trust.*"

Winthrop *vs.* Attorney-General, 125 Mass., 258, 262.

A statute authorizing the administration of a trust by trustees not appointed or authorized by the donor is unconstitutional.

Knapp *vs.* Troy & Boston R. R., 20 Wall, 117.
Cary Library *vs.* Bliss, 151 Mass.

3. It is true that both mortgages authorize the trustees to appoint agents (p. 34, marg. pag. 51; p. 48, marg. pag. 73). But the allegations of the complaint already quoted show much more than the appointment of agents. They involve the entire delegation of the trust.

However, this contention would not aid the defendants; for the mortgages provide that the trustees "shall not be responsible for the acts of agents appointed by them honestly and in good faith" (p. 37, marg. pag. 55; p. 51, marg pag. 78); and this would relieve the trustees from personal liability for the acts of their agents. The only remedy, therefore, left to the beneficiaries is against the property.

And any advantage beyond fair compensation for services gained by an agent in the course of the agency belongs to the principal.

Dutton *vs.* Willner, 52 N. Y., 312, 319.
Wardell *vs.* Railroad Co., 103 U. S., 651.

4. All the authorities recognize the right of the beneficiary to elect to follow the property whenever it is disposed of in violation of a trust once impressed upon it. These are cited on pp. 21, 22 of the principal brief.

5. In the case at bar the trust impressed was to sell the land to the best advantage so as to realize the amount due the bondholders.

In violation of this trust it was sold so as to realize nothing for the bondholders. This was accomplished.

A. By a consent to an order making the Receiver's certificates a lien on the second land grant.

B. By admitting the priority of this lien in the bill to foreclose the mortgage on this land grant.

This admission was made by the holders of the certificates

which were thus advanced to priority (Art. 20, pp. 7, 8; Art. 23, pp. 8, 9). This admission left nothing for the Court to adjudicate. It was fatal to the bondholders under the Birdseye mortgage. It was really made by the holders of the Receiver's certificates. They were *domini litis*. They controlled the suit.

6. This admission was manifestly a violation of the duty of the trustee to the bondholders who were holders of Receiver's certificates. He could not admit away their rights. He was bound to protect them.

Vermont & Canada R.R. v. Vermont Central R.R. 50 Vt. 570, 594

7. By means of this breach of trust, the Davis party, who had thus given an admission:

a. In their own favor

b. Against the other bondholders, became possessed of the second land grant. They had notice of the trust. It was expressed in the mortgage which they were foreclosing.

8. Therefore, they took this property charged with the trust.

The rule on this subject is well expressed in a recent case.

Wood *vs.* Supervisors, 50 Hun (N. Y.,) 1.

At p. 12, the Court say:

"It is a uniform rule that all persons who take through or under the trustee shall be liable to the execution of the trust, and all assignees of the trustees, except purchasers in good faith, shall be bound by the trust. (Wetmore *vs.* Porter, 92 N. Y., 76; Oliver *vs.* Piatt, 3 How. (U. S)., 333; Lewin on Trusts, 279; Pomeroy's Equity, Sec. 1048; Van Alen *vs.* American Nat. Bank, 52 N. Y., 8; Justh *vs.* Nat. Bank of the Commonwealth, 55 *id.*, 478; Holden *vs.* N. Y. and Erie Bank, 72 *id.*, 286; Pennell *vs.* Deffell, 4 De Gex, M. & G., 372)."

Fifth.

The defendant's brief states that Wells' claim to a trust does not relate to any specific land. This is a misapprehension.

The release to him describes specific land (pp. 59–62), and a trust is claimed to exist in respect of the land mentioned in this release (pp. 19, 20).

Sixth.

The defendant's brief claims that Wells is barred because of some alleged notice to his solicitor Avery. A complete answer to this is that the complaint avers that "the entry and signing of said order and decree were procured secretly and without notice to the said Jonathan Tremaine Wells, or to his said solicitor" (p. 15, Art. 34; see also Art. 26, p. 10). It is alleged that the cross bill admitted his rights, and that he thereupon suffered this bill to be taken *pro confesso* (p. 14). He was made defendant only by the cross bill.

Seventh.

In addition to the cases cited on page 14 of the original Brief, in support of the proposition that redress could be had in a Court other than that in which the fraudulent decree was rendered, we refer to a case decided by this Court at the present Term.

Marshall *vs.* Holmes, November 9, 1891, Chicago Legal News, December 5, 1891, p. 105; 12 Supreme Ct. Rep., 62.

In this case it was held sufficient to justify relief in equity that the proof necessary to sustain the defense at law was not discovered until after the rendition of the judgment. *A fortiori* should relief be granted, where, as in the case at bar, the facts themselves were not discovered until after the decree complained of.

Eighth.

In conclusion, we draw the attention of the Court to the delay in the hearing upon these demurrers. The suit was begun February 7, 1884 (p. 1). The defendants removed it into the Circuit Court. The demurrers were not argued until May 16, 1887 (p. 98), owing to the inadequate judicial force in the Second Circuit. The crowded state of the calendar of this Court has delayed a hearing for nearly four years.

We, therefore, respectfully and earnestly ask the Court to decide all the questions involved, so that when the cause is remanded, as we contend it should be, the Court below may be fully instructed as to the rights of the parties.

JOHN CUMMINS,
Attorney for Appellant.

EVERETT P. WHEELER,
Of Counsel.

JAN 5 1882

C. G. Bufgoyne's Printing Business, 146 150 Centre St. N. Y.

SUPREME COURT OF THE UNITED STATES.

ANDREW KENT, Executor of Jonathan T. Wells,
Appellant,

AGAINST

THE LAKE SUPERIOR SHIP CANAL RAILWAY AND IRON COMPANY and others,
Appellees.

Reply by Appellees to Brief for Appellant.

The position of the appellant is thus stated in his brief (p. 20): "His *remedy* grows out of the fraud. His *right* arises from the "errors committed to his prejudice."

The errors alleged are:

1. That the Michigan decree erred in making the Receiver's certificates a lien upon the second land grant of 200,000 acres.

2. That it erred in holding that the proceedings for the Birdseye release were ineffectual because they took place *pendente lite*.

I.

Granting that the errors occurred, they appeared upon the face of the record. In such a case not only the primary, but the only relief is in the cause, by motion or appeal.

United States vs. Throckmorton, 98 U. S., 61, 65.
Knox Co. vs. Harshman, 133 U. S., 152, and cases cited.
Taylor vs. Charter Oak Life Ins. Co., 17 Fed. Rep., 566.
Vilas vs. Jones, 1 N. Y., 274, 283
Stillwell vs. Carpenter, 59 N. Y., 414, 423.
Smith vs. Nelson, 62 N. Y., 286.
Mayor, etc., of N. Y. vs. Brady, 115 N. Y., 599, 614–18.
Story Eq. Pl., § 410.

That a decree was obtained by perjured testimony affords no ground to set it aside as fraudulent.

Vance vs. Burbank, 101 U. S., 514.
United States vs. Throckmorton, 98 U. S., 61, 65–69.
Ross vs. Wood, 70 N. Y., 8.

A fortiori, manifest error or insufficiency of evidence is no foundation for relief by suit in equity.

Vide cases cited, *ante*.

Also

Crim vs. Handley, 94 U. S., 652.
Cragin vs. Lovell, 109 U. S., 194, 198.
Hunt vs. Hunt, 72 N. Y., 217, 226.

In *Cragin vs. Lovell* it was held that a defendant against whom a judgment has been rendered on default by a Circuit Court of the United States could not maintain a bill in equity to avoid it, upon the ground that the plaintiff had falsely and fraudulently alleged that the parties were citizens of different States; without showing that the false allegation was unknown to him before the judgment. In this case both Wells and Birdseye, his trustee, were parties to the proceeding, knew all about it, litigated the question of Sutherland's residence and were defeated.

The claim in respect of the Receiver's certificates that they were invalid because Sutherland was not a resident of New Jersey, by his testimony taken on commission he admitting "that he had "voted and paid personal taxes as a citizen of New York for eighteen "years then last past, and that his claim, if any there was, to a

" citizenship in New Jersey was founded solely on the fact that he " spent a month in the summer of 1882 as a boarder in Orange in " the State of New Jersey " (p. 9, fol. 13), and the further claim that the decree, " though purporting to be entered upon the proofs and " after hearing, in reality, paid no regard or attention to the pleadings " in said suits or to the proofs upon file," of themselves establish that what is sought is a reversal of the decree for claimed error under the pretext that erroneous action by a Court constitutes fraud.

II.

But there was no error.

First. Birdseye, trustee of the second land grant mortgage, which secured $40,000 of Wells' bonds, was a party to the Sutherland suit in which the order for Receiver's certificates was made. The order bound him. The certificates were authorized to be issued (p. 7, fol. 10) " for the purpose of completing the construction of " said canal." Both the land grants were dependent upon its being constructed (p. 2, fols. 3–4).

Vide Jerome vs. McCarter, 94 U. S., 734, 730, in which this was judicially decided.

If, of the $640,000 of Receiver's certificates $140,000 were issued at sixty per cent. when the order required that they should be issued at seventy-five per cent. (the record in the cause would show that there was an order permitting them to be issued at sixty per cent.) the remedy was in the action.

On the allegations of the complaint it was immaterial. $500,000 of the certificates were issued at seventy-five per cent. This was in 1872 (p. 7, fols. 10–11). The sale was in 1877 (p. 17, fol. 25). At this time the $500,000 with interest much exceeded the $550,000, at which amount the certificates were received in payment.

Second. The following are the facts about the Birdseye release: The order for the Receiver's certificates was made in the Suther-

land suit, to which Birdseye as trustee of his mortgage was made a party (p. 6, fol. 10). The certificates were purchased by Boorman Johnston & Co. and Ayer & Co. (p. 7, fol. 11), the money realized being "for the purpose of completing the construction of said canal" (p. 7, fol. 10). On July 5, 1872, Birdseye, trustee, filed a bill to foreclose his mortgage. On August 11, 1873 (p. 39, *et seq.*) Birdseye executed the release to Wells. The suit to foreclose the Sutherland mortgage was commenced on or about May 25, 1872 (p. 6, fol. 9). The order for Receiver's certificates was made in June, 1872 (p. 7). Neither Isaac H. Knox the Receiver, who, under the order of Court issued the certificates (p. 7), Boorman Johnston & Co., or Ayer & Co., who purchased them, nor any of the other parties in interest were participants in the Birdseye release or had anything to do with it.

The order for the certificates declared (p. 7, fol. 11) that the indebtedness created by said Receiver's certificates shall constitute "a first and paramount lien over all other liens and incumbrances upon the ship canal, real and personal property and franchises of said defendant corporation, and on all the future earnings and income thereof, and shall be entitled to priority and payment over all other claims out of such real and personal property," etc.

The point is whether Birdseye, trustee, who was bound by this order, could by his mere voluntary act defy it; whether, the order determining that the Receiver's certificates were a paramount lien, he, by his release, could make Wells' bonds a lien paramount to the Receiver's certificates in respect of the 8,000 acres.

The mere suggestion is preposterous. Judge EMMONS could make no other decree than he did.

This further claim is made by the appellant:

On August 27, 1872 (p. 8, fol. 11), the company was adjudicated a bankrupt. In September, 1873 (p. 13, fol. 19), the assignees filed an omnibus bill (obviously collusive) setting forth in detail the facts relating to the Birdseye release and *praying to have it declared* valid! Wells appeared and stipulated that the bill should be taken *pro confesso* against him (p. 14)!

He maintains that by this proceeding the receivership order could be undone, and upon the 8,000 acres his lien be made paramount to the Receiver's certificates. The claim comes down to the assertion that Wells himself and the assignees in bankruptcy, whose interests, if any, were subsequent to the Receiver's certificates and to all

the mortgages, could by allegation and admission make Wells' bonds a paramount lien.

The claim answers itself. It is absurd. It is none the less absurd when coupled with the assertion (p. 15, fol. 22) that Judge EMMONS' decree, "though purporting to be entered upon proofs, in "reality paid no regard or attention to the pleadings in said suits or "the proofs upon file in same." This is supposed to bear upon the appellant's claim that Judge EMMONS erred in holding upon the evidence before him that Sutherland resided in New Jersey, and that the Court, therefore, had no jurisdiction of the Sutherland case in which the Receiver's certificates were issued.

JNO. E. PARSONS,
For Defendants.

144 U S 92

In the Supreme Court of the United States.

UNITED STATES OF AMERICA

vs.

THOMAS H. HEATH.

Upon a petition for a Writ of Error to the Supreme Court of the District of Columbia, in a case of conviction of an infamous crime, to wit: Manslaughter.

PETITION

AND

ASSIGNMENT OF ERRORS.

In the Supreme Court of the United States.

UNITED STATES OF AMERICA *vs.* THOMAS H. HEATH.	*Upon a petition for a Writ of Error to the Supreme Court of the District of Columbia, in a case of conviction of an infamous crime, to wit: Manslaughter.*

PETITION.

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, THOMAS H. HEATH, respectfully represents that in the month of June in the year 1891, in the Supreme Court of the District of Columbia holding a Special Criminal Term, he was tried upon an indictment for murder; was found guilty of manslaughter only; and was sentenced to be confined in the penitentiary at Albany, New York, for ten years, and to pay a fine of one hundred dollars. Afterwards, upon an appeal to the general term of said Court, on a motion for a new trial ON BILLS OF EXCEPTIONS TAKEN DURING THE TRIAL, the Court in General Term refused the new trial, and affirmed the judgment and sentence of the Special Criminal Term. All of which will more fully appear by reference to a copy of the record of said judgment and proceedings herewith filed, marked "Exhibit A," and prayed to be taken and read as part of this petition.

And now your petitioner prays your Honors to allow him a writ of error from the Supreme Court of the United States to the Supreme Court of the District of Columbia, in accordance with the provisions of Section 5 of the act of Congress approved March 3, 1891, entitled "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," of Section 846 of the Revised Statutes of the United States relating to the District of Columbia, and of the 35th and 36th Rules of the Supreme Court of the United States.

THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES to allow said writ of error seems to be manifest as follows:

The 5th Section of said act of March 3, 1891, enacts: "That appeals on writs of error may be taken from the existing circuit courts direct to the Supreme Court, in cases of conviction of a capital or otherwise infamous crime."

Said Section 846 of the R. S. D. C. enacts that: "Any final judgment of the Supreme Court of the District may be re-examined, and reversed or affirmed in the Supreme Court of the United States upon writ of error, *in the same cases and in like manner* AS PROVIDED BY LAW in reference to the final judgments of the circuit courts of the United States." The phrase, "*as provided by law*," in respect of tense or time, is carefully indefinite; and it should be construed as if it were written "as *is*, or *has been*, or *may be* provided by law." Some grammatical auxiliary must be interpolated before the word "provided," in order to make sense; and any one of the three auxiliaries above indicated will be equally relevant and appropriate. In favor of life and liberty, that one which is most liberal in its spirit, and most

comprehensive in the relief and protection which it affords the citizen, should be adopted by the Court of last resort.

The two acts of Congress known as "The Revised Statutes of the United States" (R. S. U. S.) and "The Revised Statutes of the United States Relating to the District of Columbia" (R. S. D. C.) were both approved the same day, June 22, 1874, and took effect at the same time, *uno flatu*. Reference must therefore be made to both acts, to determine the "SAME CASES" in which the law of 1874 provided that writs of error might be taken in LIKE MANNER from the Circuit Courts, and from the Supreme Court of the District.

The appellate jurisdiction of the Supreme Court of the United States was conferred, prescribed and defined by Congress in the R. S. U. S., by Sections beginning with 690 and ending with 710, both inclusive. In cases involving prizes, patents, copyrights, revenue laws, civil rights, etc., special favor was shown to appeals and writs of error "in reference to the final judgments, orders and decrees of Circuit Courts." In the same or like cases in the Supreme Court of the District of Columbia, the same indulgence and protection was provided for the suitors there.

Except in cases of divided opinions no writ of error was allowed to any judgment of a Circuit Court in criminal cases. Consequently judgments of the Supreme Court of the District in criminal cases could not be reexamined elsewhere.

In civil actions at law, and in cases of equity, and of admiralty and maritime jurisdiction, the appellate jurisdiction of the Supreme Court of the United States was

limited to cases in the Circuit Courts to "where the matter in dispute, exclusive of costs, exceeds the sum or value of $2,000." [See Sections 691 and 692, R. S. U. S]. Consequently under Section 846 of the R. S. D. C. every suitor in the Supreme Court of the District had the right of appeal or writ of error in the "same cases," provided his matter in dispute, exclusive of costs, exceeded $2,000.

But, considering the peculiar relations of Congress to the District of Columbia, and to the Territories, as exclusive legislature, Congress in its wisdom saw fit to extend the rights and privileges of suitors in those localities beyond the limit of those of suitors in the Circuit Courts of the United States; and therefore in Sections 702 and 705 of the R. S. U. S., it let down the bars half way, and enacted that suitors in the District of Columbia, and in all the Territories (except the territory of Washington), might appeal or have writs of error in all cases in which the matter in dispute might, exclusive of costs, exceed $1,000. Moreover Congress as *parens patriæ* in the District of Columbia, enacted in Section 706 of the R. S. U. S., that suitors in the Supreme Court of the District of Columbia should have the right and privilege of appeal or writ of error in any case in which the value of the matter in dispute, exclusive of costs, should exceed one hundred dollars; provided such suitor be able to find any single Justice of the Supreme Court of the United States who would be of opinion that the errors in the judgment complained of "involved questions of law of such extensive operation as to render a decision of them by the Supreme Court of the United States desirable." In order to make doubly secure the rights and privileges of suitors in the District of Columbia, in the matter of appeals and writs of error to the

Supreme Court of the United States, the Congress, in Sections 847 and 848 of the R. S. D. C., duplicated Sections 705 and 706 of the R. S. U. S.; and thereby, perhaps superserviceably, but certainly with emphasis, declared its purpose to grant to suitors in the District of Columbia, not only all the rights of appeal and writ of error provided by law for suitors in the Circuit Courts, but also in addition thereto the rights specified in the Sections 705 and 706, R. S. U. S., and 847 and 848, R. S. D. C., above referred to. Such was the state of the law in this behalf, June 22, 1874.

By the act of March 1, 1875, entitled "An act to protect all citizens in their civil and legal rights," the appellate jurisdiction of your Court was extended to all cases arising under said act, without regard to the sum in controversy. There was no doubt that this extension included cases in the Supreme Court of the District of Columbia, although said court is not mentioned in the act; but, on the contrary, it might hypercritically be deemed to be inferentially excluded by the emphasis with which the Territorial, District and Circuit Courts of the United States are mentioned in the 3d Section, [Supplement to R. S., 2d Ed., p. 68.]

By the act of March 3, 1881, entitled "An act to authorize the registration of trade-marks and protect the same," appellate jurisdiction was again conferred upon this Court, without regard to the amount in controversy. It has not been believed that trade-marks cases in the Supreme Court of the District were excluded from the privileges of this act. [Supplement p. 324.]

The act of March 3, 1885, amending Section 764 of the Revised Statutes so as to allow appeals from the Circuit Courts in *habeas corpus* cases, has been supposed

to embrace also like cases in the Supreme Court of the District. [Supplement p. 485.]

For the relief of the docket of your Court, the act of March 3, 1885, entitled "An act regulating appeals from the Supreme Court of the District of Columbia, and from the Supreme Courts of the several Territories," *restricted* your appellate jurisdiction, by lifting the pecuniary limit from $1,000 to $5,000. It was in no proper beneficial sense a local act. [Supplement, 4 85.]

Section 6 of the act of February 6, 1889, *extended* the appellate jurisdiction of your Court to all cases of conviction of capital crime before any court of the United States. It is respectfully suggested that there can be no room for doubt, that this act embraced the same or like cases in the Supreme Court of the District of Columbia. [Supplement, 639.]

The act of February 25, 1889, again *restricted* your appellate jurisdiction by raising the pecuniary limit from $2,000 to $5,000 in all cases from the Circuit Courts. And thereby placed cases from the Circuit Courts upon the same footing with cases from the District of Columbia, and from the Territories under the act of March 3, 1885, aforesaid. [Supplement, 650].

Then again, the act of March 2, 1889 [Supplement 689] *extended* your appellate jurisdiction, by lowering the limit in Inter-State Commerce cases to $2,000. And the act of June 10, 1890 [Supp., 752] abolished the pecuniary limit altogether in Customs-Revenue cases. Can there be any question whether these two acts apply to same or like cases from the Supreme Court of the District of Columbia?

Finally, comes the act of March 3, 1891, which *enlarges* the appellate jurisdiction of your Court in criminal cases, so as to embrace not only capital, but otherwise infamous crimes. It is difficult to suggest any reason why this jurisdiction should not extend to cases in the Supreme Court of the District of Columbia as well as to the same or like cases in the Circuit Courts.

The result of all this legislation seems to be that Section 846 of the R. S. D. C., which has never been repealed, expresses to-day as it did in 1874, the true law of this subject, which is: "Any final judgment, order or decree of the Supreme Court of the District may be re-examined, and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same cases and in like manner as provided by law in reference to the final judgments, orders and decrees of the Circuit Courts of the United States."

Your petitioner files herewith AN ASSIGNMENT OF ERRORS, which he asserts and intends to urge, and prays that the same may be read as part of this petition.

Petitioner further respectfully states unto your Honors, that he is a negro shoemaker, sixty-nine years old, and very poor; that he has no money, property or estate of any kind whatever; no credit, no friends able to help him; and no income, except a pension of twelve dollars per month, allowed him by the United States on account of the disabilities and wounds referred to in the testimony; which pension he cannot hypothecate or pledge; that he is indebted to the charity of strangers for means to have this petition printed. Therefore, he prays that he may be per-

mitted to sue in your Honors' Court and prosecute his writ of error there, *in formâ pauperis*, without paying costs, or being required to give security therefor; and that such orders may be made by your Honors as will secure for him a hearing: and that the judgment against him may be reversed, and a new trial granted him. And he will ever pray, &c.

THOMAS H. HEATH,

By A. K. Browne and John Lyon, his Attorneys.

In the Supreme Court of the United States.

United States of America *vs.* Thomas H. Heath.	*Upon a petition for a Writ of Error to the Supreme Court of the District of Columbia, in a case of conviction of an infamous crime, to wit: Manslaughter.*

ASSIGNMENT OF ERRORS.

I.

The Court erred in rejecting and discharging from service as jurors in the case Robert F. Bradbury, G. W. Jones, and Richard Rothwell, Jr., respectively, under the circumstances and upon the facts set forth in the First, Second and Third Bills of Exceptions, printed on pages 4, 5, 6, 7 and 8 of the copy of the Record filed with the petition.

II.

The Court erred in admitting and permitting to be read to the jury as dying declarations of the deceased, a certain written *ante-mortem* statement alleged to have been made by the deceased; and especially in admitting as evidence so much of said *ante-mortem* statement as purported to give an account of two separate fights and of certain threats, which preceded by distinct intervals of time the transaction which resulted in the death of the deceased. Said *ante-mortem* statement is

as follows [See Record pp. 21, 22, and Fourth Bill of Exceptions, Record pp. 8 to 22]:

"PROVIDENCE HOSPITAL,
"WASHINGTON, D. C., *November* 18, 1890.

"I, Emanuel Taben, being, as I solemnly believe, in the presence of death from the effects of a mortal hurt, from which I am now suffering, and having abandoned all hope of recovery, in the face, as I believe, of impending death, do solemnly state that the circumstances under which I received the said mortal injury are as follows :

"The name I got from my mother was Harrison, but my right name is Emanuel. I rent from this old man with whom I had the difficulty with. His name is Heath. His first name I do not know. I started out the back way from my house, the house I rent from him, to get some coal oil. He walked down near the water-closet in my yard and cursed me about going through the back gate. He said, I don't aim for you to go through that back gate (we both live in the same house, he in the front room, and I live in the back room). He dared me to move. We were both facing each other. He was nearer my room than I was, and I concluded that if there was going to be a disturbance I would not go out the back gate. *I aimed to step around him to go out the alley. He grabbed an axe from the ground, which I used to chop wood with, and struck at me and cut me on the left arm.* In striking at me he threw himself nearly down. I grabbed him and the axe. We got tussling. We both had hold of the axe. He was about to get me under him. *He said I intend to kill you.* In the scuffle I got rather the advantage of him and begged him to quit. *He said, no, I'll kill you at the risk of my life.* We both had hold of the

axe, but I had more purchase on it than he had, and I tapped him on the head with the eye of it, and not the blade; parcel of women ran out and said don't kill father, and gave up and stopped. I started in my room. He had to pass my room to get to his room. In passing he grabbed me and tried to bite me, and in that scuffle somebody got the door of my room open, and shoved me in my room and locked me in. The door was locked on the outside. There was a young man in the room with me by the name of Riley Griffin. The door was unlocked and Griffin went out, but I didn't go out then. I lost three cents in the yard during the scuffle. I got some more money out of a box and started for the coal oil. *I went out the door and was putting the hasp on my door, when he jumped out of his room and stabbed me in the right side of chest with a shoe knife, and then ran through his own room out into the street. I had done nothing to him at that time. I called everybody and told them that he had stabbed me. He didn't have hold of me. He just "soused" it into me and left the knife in me and ran. I pulled it out and gave it to an officer.* The blade was about four inches long. I cannot write.

his
EMANUEL ⋈ TABEN."
mark.

"Witness to mark—

"CHAS. K. KOONES, *M. D.*

"THOS. B. BROOKS.

"3.55 P. M."

III.

The Court erred in excluding the testimony of Mary Browne as to the fact that drops or spots of blood were found inside and on the floor of the prisoner's room and within a yard of the door leading into the hall, and at the place where the mortal blow was al-

leged by one of the witnesses to have been struck ; under the circumstances and upon the facts set forth in the Fifth Bill of Exceptions, on pages 23 to 30 of the Record. The whole testimony of the Government's witness, Mary Browne, is quoted from pages 29 and 30 of the Record as follows :

"2. Mary Browne, whose testimony tended to prove that she succeeded Heath and Tapin as tenant of the first floor rooms at 110 C street, S. W., renting them from the owner, Mr. Smith ; that she moved in about two weeks after the difficulty ; that the lock on the door between the front room and the hall is the same now as it was when she moved in ; that the hasp or catch of the lock was not broken, but after she had been there awhile one of her children pushed it loose, *and the witness drove in a steel wire nail and bent it over to hold it tight.*"

"Upon cross-examination, this witness was asked the following question : "When you moved into that house two weeds after Heath vacated it, did you or not observe and notice on the floor of the front room, within a yard of the door leading into the hall, any drops or spots of blood ?"

"To this question the District Attorney objected, and the witness was not allowed by the justice presiding to answer it. To which ruling of the justice, sustaining the objection of the District Attorney, and refusing to permit the witness to answer said question, the defendant by counsel excepted, and the court noted the exception."

IV.

The Court erred in giving to the jury upon prayers by the District Attorney, the following instructions:

1. If the jury find from the evidence that the defendant on the 16th day of November, 1890, stabbed Emanual

Tapin with a knife and that the said Tapin subsequently on the 22d day of November, 1890, died from the mediate or immediate effects of the wound made by said knife, and that the said defendant stabbed the said Tapin maliciously, then they should find him guilty as indicted.

Malice exists where there is a previously formed design to do injury to another, and it is immaterial how brief a time such design may have been formed prior to the striking if it existed at the time; and the existence of malice may be inferred from the use of a deadly weapon, such as an axe, a gun or a knife of sufficient size to cause a fatal or dangerous wound, or from previous threats or acts or demonstrations of violence by defendant against or toward deceased with a dangerous weapon, if the evidence shows any such were made; but such inference is subject to the controlling influence of the other facts and circumstances in evidence, all of which must be considered by the jury. [*See Record pp.* 31, 32, 33.]

2. The jury is instructed that the occurrences in the yard and hall prior to the stabbing would not justify the defendant in stabbing Tapin, and if the evidence satisfies them beyond a reasonable doubt that the defendant stabbed Tapin in retaliation or revenge for what had previously occurred in the yard and hall, and that when he so stabbed him the defendant was not under reasonable apprehension of danger to his life, or great bodily harm from deceased, then they should find him guilty as indicted, unless they find from the evidence that the fatal blow was inflicted by the defendant while he was in the heat of passion engendered by the previous affray which either had not cooled or had not had time to cool, in which event, and if they so find, they should return a verdict of guilty of manslaughter.

3. The plea of self-defense cannot avail the defendant unless the jury find from the evidence that at the time he stabbed the deceased the latter committed some overt act, or made some attempt indicative of an intent on his part of immediately killing defendant or doing him some great bodily harm, and such act or attempt must have been of such a character as to create, and that it did create in the mind of the defendant are asonable apprehension that he was in imminent danger of death or great bodily harm from deceased from which there was no reasonable way of escape consistent with the safety of his own life or security from such serious bodily harm; and it is for the jury to determine from all the evidence whether there was at the time of the stabbing any reasonable ground for such apprehension ont he part of defendant. And in that connection it is proper for the jury to consider whether at the time of the stabbing the deceased was armed with a deadly weapon or was prepared to inflict death or great bodily harm.

By imminent danger is meant immediate danger, such as must be instantly met, and cannot be guarded against by calling upon others for assistance or the law for protection. By great bodily harm is meant something more than a mere battery; it means personal violence of such a character as to imperil life, or maim, or do grievous physical injury.

To each and every one of said instructions, and to the granting of them by the Court, the defendant, by counsel, then and there excepted, and the Court noted the exceptions. [*See Record pp.* 31, 32, 33.]

V.

The Court erred in refusing to give to the jury upon prayers by the defendant the following instructions :

5. That if the defendant armed himself in his own room only for a purpose of defending himself, and if the jury find from the evidence that after he had thus armed himself he was assaulted by Tapin, and that from such assault he had reasonable ground to apprehend and did honestly apprehend from such assault danger to his life or great bodily harm, and to protect himself against such apprehended injury he stabbed Tapin with a knife with which he had armed himself, you should find him not guilty.

6. That the law presumes the innocence of a party until the contrary is established by indisputable evidence, and such evidence adduced to establish his guilt must be so conclusive as to be utterly inconsistent with any other reasonable hypothesis, and this presumption of innocence applies to each and every fact that goes to constitute the crime charged and relied on for conviction, and the law resolves each fact in favor of the accused, when such fact can be reconciled with his innocence. [*See Record p.* 34.]

VI.

The Court erred in ordering that the arguments of counsel before the jury should be limited to three hours, one hour and a half to be allowed the District Attorney and his assistant, and one hour and a half to be allowed the two counsel for the defendant. [*Record p.* 35.]

VII.

The Court erred in this: "That while Mr Lyon, junior and associate counsel for the defendant, was arguing before the jury that the drops of blood found within the door of defendant's room, as testified by the witness, Caroline Heath, upon her return from the police station, were physical facts tending to corrobo-

rate the testimony of the defendant as to the place where the mortal stab was delivered, the justice presiding interrupted Mr. Lyon, and said to the jury that, 'No proper inference could be drawn from the presence of those drops of blood, as testified by Caroline Heath, because no witness had testified that it was Tapin's blood, and several witnesses had testified that Heath was bleeding.' *To which Mr. Lyon, addressing the Court, replied, 'I expected such a reply from the District Attorney, but not from the Bench. I will thank your Honor to make a memorandum of the words you have just uttered and note my exception thereto.'*" [*See Record p.* 35.]

VIII.

The Court erred in this: "That when Mr. Lyon finished his argument to the jury, the Court announced that he, Mr. Lyon, had occupied one hour and a half, the whole time allowed by the order of the Court for both the counsel for the defendant. *That Mr. Lyon then expressed regret that the necessities of the case and his sense of duty to his client h id compelled him to occupy so much time, and an earnest hope that the defendant would not be deprived of the services of his leader, Mr. Browne, who was the first and senior counsel in the case, on whom the defendant chiefly relied. Mr. Browne then requested the Court to permit him to argue the case, and promised that he would occupy no more time than would be necessary, according to his conscience and best judgment absolutely necessary, to properly present the case to the jury.* Whereupon the Court extended the time to two hours for each side, and said that Mr. Browne would be permitted to address the jury for half an hour and more. *Whereupon Mr. Browne said to the Court that he could not in that time do justice, either to his client or himself,*

as he had taken extensive notes of the testimony with a view of summing up the case by a review of all the testimony; but the Court insisted that the case must be closed that day; and if he (Mr. Browne) wished to proceed he must do it at once, under the half hour extended to him, which Mr. Browne did under protest and exception, and closed punctually at the time to which he was limited. To which ruling and order of the Court, limiting the argument of Mr. Browne to half an hour, the defendant by counsel excepted, and the Court noted the exception." [*See Record p.* 35].

IX.

In delivering the Judge's charge to the jury, after the evidence and arguments of counsel were concluded, the Court erred in using the words contained in the following paragraphs and sentences:

1*st.* [*Record pp.* 50. 51.]

"Heath in the prior altercation having received a blow upon the head which caused the blood to flow, and in this hallway, having been bitten by Tapin, to what extent we do not know, for no physician has testified to either wound, nor has anyone indicated the character or extent of the wound upon the head or upon the throat, except so far as Heath indicated it by showing a hat with a hole in it." [See Record pp. 50. 51.]

2*d.* [*Record p.* 51.]

"The theory of the Government from that point is that Tapin was locked up in his room, and that when things had quieted down, and there was no evidence but that the altercation was over, Riley Griffin had gone to church or had gone away, the door was opened so as to permit Tapin to leave. He brought out his oil can, and whilst he was fastening his door or whilst

picking up his oil can this knife was stuck into his body, and that theory is sustained by several witnesses whom you have heard."

3rd. [*Record p.* 51.]

"Now, the court said that no inference could properly be drawn from the presence of that blood on the floor, because no one testified that that was Tapin's blood, and witnesses have testified that Heath was bleeding and that the blood had dripped over his person, and in the absence of any testimony directly tending to prove that Tapin had bled upon the floor in this room, the court felt justified in saying in response to argument that no proper inference could be drawn from that fact. The court did not, however, gentlemen of the jury, intend to take possession of that fact or of any other fact in the case, for that is all left to you for determination. It was simply in response to the position, taken improperly by the defense, that it was the duty of the Government to bring a witness here to prove, at this time that there was no blood on the floor or at the time the woman, Brown, took possession of the room."

4th. [*Record pp.* 53, 54.]

"The court also tells you, before adverting to what constitutes self-defense, that whilst you are to view the circumstances of the case from the defendant's standpoint and ascertain really whether he did strike the blow in self-defense or not, yet if the evidence satisfies you that he acted carelessly or negligently when he was in no real danger, and he had no reason to apprehend that he was in danger either of loss of life or of great bodily harm, and the blow was struck under an apprehension, but a negligent and careless apprehension, he would be guilty of manslaughter. So that you have two theories that would reduce the crime to man-

slaughter: One is, the blow struck in the heat of passion when Tapin had been the aggressor and the passion had not cooled or had time to cool; the other is, if it was struck under an apprehension of danger, but the apprehension of danger was not reasonable, but was negligent and careless."

"The first fact for you to determine under that instruction, is whether Tapin made any assault at that time upon Heath. Is there any evidence in this case that at that time Tapin was armed with any weapon of any description or character? Is there any evidence in this case that at that time Tapin raised his hand in a threatening manner for the purpose of inflicting a blow, for words do not constitute an assault, no matter how unpleasant, or however violent or opprobrious they may be. Threats do not constitute an assault, and if that was all that Tapin did at that door, it was no justification whatever for the infliction of that blow."

"If the facts are as detailed by Heath himself, that Emanuel Tapin came to that door; if he took a step inside of that door and made use of the threatening language which is attributed to him, but made no demonstration of assault; if he raised neither weapon nor hand for the purpose of making an assault; and that Heath stepped up toward him and met him and plunged that knife in him, whether he was actuated by the influence of fear or not, you should find him guilty of manslaughter at least."

"It is no earthly defense to say that you believed a man who is threatening you by some present words, and who is not making any demonstration towards you that you believed he was going to do you some bodily harm. There must be some overt act. He must make some demonstration, either with the hand or with a weapon (generally, undoubtedly with a weapon), indi-

cating the present purpose and ability to carry out his threat, or the party who is under a fear of assault has not justification for inflicting a fatal wound by using a knife or a pistol."

5th. [*Record p.* 55.]

"Though a reasonable doubt is a term that is difficult to define, yet it has its limitations. It is a doubt which reasonable men entertain after hearing all the evidence in a case; not an unreasonable doubt; not a mere capricious doubt; and if the evidence in any case is sufficient to satisfy a jury to an extent which would justify them in acting upon the more important affairs of life, then the jury are satisfied beyond a reasonable doubt. If the evidence fails to satisfy them to that extent and up to that point, then they have a reasonable doubt. That is to say, gentlemen of the jury, applying to the evidence in this case the same measure which you would apply to evidence which would be used to induce you to act in any of the important affairs of life; if you are satisfied beyond a reasonable doubt and to that point, then you are justified in acting upon your conviction of guilt."

And the petitioner asserts, and intends to urge all of the errors above assigned, and such others as the Court may request.

Respectfully submitted,

THOMAS H. HEATH,

By A. K. Browne and John Lyon, his Attorneys.

apparently not reported up to 151 US

Supreme Court of the United States.

OCTOBER TERM, 1891.

IN RE THOMAS H. HEATH.

PETITION FOR A WRIT OF ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF IN OPPOSITION TO THE PETITION.

WM. A. MAURY,
Assistant Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1891.

IN RE THOMAS H. HEATH.

PETITION FOR A WRIT OF ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF IN OPPOSITION TO THE PETITION.

The petition sets forth that the petitioner, Heath, was tried under an indictment for murder and convicted of manslaughter in the supreme court of the District of Columbia, in the month of June, 1891, and sentenced to be confined in the penitentiary at Albany, N. Y., at labor for ten years, and to pay a fine of $100. This judgment or sentence was afterwards affirmed by the same court, holding a general term.

The petition is accompanied by various assignments of error which, it is claimed, are supported by the various exceptions contained in the bill of exceptions set forth in the record.

This application for the writ is based on section 5 of the act of Congress of March 3, 1891, entitled "An act to establish circuit courts of appeals and to define and regu-

late in certain cases the jurisdiction of the courts of the United States, and for other purposes," and on section 846 of the Revised Statutes of the District of Columbia and rules 35 and 36 of this court.

Section 5 provides as follows:

> That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:
>
> * * * * *
>
> In cases of conviction of a capital or otherwise infamous crime.
>
> * * * * *

Section 846 (R. S., D. C.) is as follows:

> Any final judgment, order, or decree of the supreme court of the District may be reëxamined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same cases and in like manner as provided by law in reference to the final judgments, orders, and decrees of the circuit courts of the United States.

The argument is that under the benignant interpretation of section 846 contended for, this court may review the judgments, orders, and decrees of the supreme court of the District, not only "in the same cases and in like manner as provided by law in reference to the final judgments, orders, and decrees of the circuit courts of the United States *at the time section* 846 *was enacted*, but *in all other cases and in any other manner* that may be provided for by any *subsequent legislation of Congress* in reference to the final judgments, orders, and decrees of the circuit courts of the United States.

We are to bear in mind that section 846 is local and restricted in its operation, being an extension of the appellate jurisdiction of this court to the District of Columbia. This consideration makes the claim set up in the petition a very extraordinary one, for it virtually asks

this court to hold that Congress meant by section 846 to make applicable to the Supreme Court of this district *all future legislation* touching the appellate jurisdiction of this court over the circuit courts of the United States.

This would be a somewhat dangerous position to take, because Congress in legislating for the nation at large on this subject might not be always mindful of the District, and might, through inadvertence, impose on the people here a law not intended for them and not adapted to them.

We think that the rule will be found to be that a local law adopting a general law is held to adopt that law as it existed at the time of adoption, and not as it might be afterwards amended for general purposes.

It is believed that the question involved in this application has been settled by this court in one of its best-considered decisions.

In *Kendall* v. *United States* (12 Pet., 524), one of the questions was whether the circuit court of this district had power to issue the writ of mandamus to a public officer.

That court was established by the act of Congress of February 27, 1801 (2 Stat., 103), which provided by section 2—

> That there shall be a court in said district, which shall be called the circuit court of the District of Columbia, and the said court and the judges thereof shall have all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States.

At the time this law went into effect the powers of the circuit courts of the United States were prescribed by the act of February 13, 1801 (2 Stat., 89). This act was repealed by the act of April 29, 1802 (2 Stat., 156).

The much considered question in the case was whether

the powers of the circuit court of this district had changed with those of the circuit courts of the United States in consequence of the repeal of the act of February 13, 1801 (*Supra*).

Upon this point we give the words of the court:

> And the power in the court below to exercise this jurisdiction, we think, results irresistibly from the third section of the act of the 27th of February, 1801, which declares that the said court, and the judges thereof, shall have all the powers by law vested in the circuit courts, and the judges of the circuit courts of the United States. The question here is, what circuit courts are referred to by the act of the 13th of February, 1801. The circuit courts established under the Judiciary act of 1789 were abolished; and no other circuit courts were in existence except those established by the act of 13th February, 1801.
>
> It was admitted by the Attorney-General, on the argument, that if the language of the law had been, all the powers now vested in the circuit courts, etc., reference would have been made to the act of the 13th February, 1801, and the courts thereby established. *We think that would not have varied the construction of the act.* The reference is to the powers by law vested in the circuit courts. The question necessarily arises, what law? The question admits of no other answer, than that it must be some existing law by which powers are vested, and not a law which had been repealed; and there was no other law in force vesting powers in circuit courts, except the law of the 13th February, 1801, and the repeal of this law, fifteen months afterwards, and after the court in this District had been organized and gone into operation, under the act of 27th February, 1801, could not, in any manner, affect that law any further than was provided by the repealing act. To what law was the circuit court of this district to look for the powers vested in the circuit courts of the United States, by which the court was to be governed during the time the act of the 13th February was in force? Certainly to none other than that act. And whether the time was longer or shorter before that law was repealed could make no difference.
>
> It was not an uncommon course of legislation in the States at an early day to adopt, by reference, British statutes; and this has been the course of legislation by Congress in many instances where State practice and State process has been adopted. *And such adoption has always been considered as referring to the law existing at the time of adoption; and no subsequent legislation has ever been supposed to affect it. And such must necessarily be the effect and operation of such adoption. No other rule would furnish any certainty as to what was the law; and would be adopting prospectively all changes that might be made in the law. And this has been the light in which this court has viewed such legislation.* In the case of *Cathcart* v. *Robinson* (5 Peters, 280) the court, in speaking of the adoption of certain English statutes, say: By adopting them they become our own *as entirely as if they had been enacted by the legislature.* We are then to construe this third section of the act of 27th of February, 1801, as if the eleventh section of the

act of 13th of February, 1801, had been incorporated at full length; and by this section it is declared that the circuit courts shall have cognizance of all cases in law or equity arising under the Constitution and laws of the United States, and treaties made or which shall be made under their authority; which are the very words of the Constitution, and which is, of course, a delegation of the whole judicial power in cases arising under the Constitution and laws, etc.; which meets and supplies the precise want of delegation of power which prevented the exercise of jurisdiction in the cases of *McIntire* v. *Wood* (7 Cranch, 504) and *McClung* v. *Silliman* (6 Wheat., 598); and must, on the principles which governed the decision of the court in those cases, be sufficient to vest the power in the circuit court of this District.

The refusal of this court to countenance the contention, in the case cited, that the powers of the Circuit Court of this District were no longer the powers conferred on the circuit courts of the United States by the act of February 13, 1801, but were the powers remaining to those courts after the repeal of the said act, seems to call for similar action in this case.

The case of Kendall v. The United States would seem to be conclusive but for the suggestion from this court to counsel in Wales v. Whitney (114 U. S., 565) with reference to an application for an original writ of *habeas corpus*, namely, that the act of Congress of March 3, 1885, "had restored the appellate jurisdiction of this court in *habeas corpus* cases over decisions of the circuit courts, *and that this necessarily included jurisdiction over similar judgments of the supreme court of the District of Columbia*" under section 846 (R. S., D. C.).

The question does not seem to have been discussed, and no reference even was made to Kendall v. the United States.

Evidently the counsel for Wales, the appellant, were of opinion that this court had no appellate jurisdiction in

the case, and, therefore, their application, in the first instance, was for an "original writ of *habeas corpus*."

It is hardly to be supposed that the case of Wales v. Whitney is to be treated as overruling the case of Kendall v. The United States and as laying down a rule which will much burden this court with writs of error to the criminal side of the supreme court of this District, with its general criminal jurisdiction, besides greatly impairing the administration of criminal justice in the District by the delays in its administration which must attend upon an appellate jurisdiction of this court in such cases.

It may be, however, that this court would have appellate jurisdiction over the supreme court of the District in cases of *habeas corpus*, and the other civil cases mentioned in the petition, under section 2 of the act of March 3, 1885 (23 Stat., 443; Rev. Supplement, p. 485), which extends that jurisdiction "to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or *statute of or an authority exercised under the United States;* but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

This comprehensive clause would seem to meet the argument *ab inconvenienti* suggested in the petition as the result of a disclaimer of appellate jurisdiction on the grounds herein urged.

As bearing directly on the question in hand, we would remark that we are not advised that a writ of error to the supreme court of this District has ever been applied for

in a capital case under the act of February 6, 1889 (25 Stat., 656), although section 6 of that act provides for a writ of error from this court in all such cases "*tried before any court in the United States.*"

It shows the sense of the bar of this district as to an appellate jurisdiction in this court in capital cases tried in the District that no application for a writ of error in any such case has been made to this court.

In Endlich, on Statutes, section 233, it is said that "the adoption in a local law of specific regulations in a general law—is not necessarily indeed, not unless a contrary intent be clear—an adoption of subsequent changes therein," citing *Darmstaetter* v. *Moloney* (45 Mich., 621).

In the very limited time at our disposal we have been able to find several cases which are more or less pertinent to the question in hand: *Schwenke* v. *Union D. and R. R. Co.* (7 Col., 512, 515, 516); *In re Main street* (98 N. Y., 454); *Knapp* v. *Brooklyn* (97 N. Y., 520); *Wood* v. *Hustis* (17 Wis., 416); *Sika* v. *Chicago, etc., Railway Co.* (21 *ib.*, 370); *Clarke* v. *Bradlaugh* (L. R., 8 Q. B. Div. 63, 69).

It is respectfully submitted that there seems to be no ground for the application, and that the writ should be denied.

WM. A. MAURY,
Assistant Attorney-General.